DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-895
Title: Justus C. Rosemond, Petitioner
v.
United States
Docketed: January 22, 2013
Linked with 12A563
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (11-4046)
Decision Date: September 18, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 30 2012	Application (12A563) to extend the time to file a petition for a writ of certiorari from December 17, 2012 to January 16, 2013, submitted to Justice Sotomayor.
Dec 4 2012	Application (12A563) granted by Justice Sotomayor extending the time to file until January 16, 2013.
Jan 16 2013	Petition for a writ of certiorari filed. (Response due February 21, 2013)
Feb 13 2013	Order extending time to file response to petition to and including March 25, 2013.
Mar 12 2013	Order further extending time to file response to petition to and including April 24, 2013.
Apr 24 2013	Brief of respondent United States in opposition filed.
May 7 2013	DISTRIBUTED for Conference of May 23, 2013.
May 7 2013	Reply of petitioner Justus C. Rosemond filed. (Distributed)
May 28 2013	Petition GRANTED.
Jun 13 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 2, 2013.
Jun 13 2013	The time to file respondent's brief on the merits is extended to and including September 23, 2013.
Aug 2 2013	Joint appendix filed. (Statement of costs filed)
Aug 2 2013	Brief of petitioner Justus C. Rosemond filed.
Aug 2 2013	Motion to file Volume II of the joint appendix under seal filed by petitioner Justus C. Rosemond.
Aug 9 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 9 2013	Brief amici curiae of Gun Owners Foundation, et al. filed.
Aug 14 2013	Motion DISTRIBUTED for Conference of September 30, 2013.
Aug 19 2013	CIRCULATED.

Aug 20 2013	SET FOR ARGUMENT on Tuesday, November 12, 2013.
Sep 6 2013	Record received from United States Court of Appeals for the Tenth Circuit (1-box). There is a sealed document included in this record.
Sep 11 2013	Records received from USDC for the District of Utah electronically filed which includes sealed documents. (3-files)
Sep 23 2013	Brief of respondent United States filed. (Distributed)
Oct 7 2013	Motion to file Volume II of the joint appendix under seal GRANTED.
Oct 22 2013	Reply of petitioner Justus C. Rosemond filed. (Distributed)
Nov 12 2013	Argued. For petitioner: John P. Elwood, Washington, D. C. For respondent: John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2, requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of title 18 of the United States Code provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Section 2(a) of that title provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT

The decision below implicates an acknowledged conflict among the circuits concerning the elements necessary to prove aiding and abetting liability for one of the most common federal crimes—using or carrying a gun during and in relation to a crime of violence or a drug trafficking crime, in violation of 18 U.S.C. § 924(c). In most circuits, a defendant cannot be convicted of aiding and abetting a confederate's use of a firearm under Section 924(c) unless the defendant facilitated or encouraged the use of the firearm. A minority of circuits, like the court of appeals here, do not require facilitation or encouragement as an element and permit a participant in a crime of violence or drug trafficking crime to be convicted of the firearm offense based merely on knowledge that the principal used or

carried a firearm during the offense. In these circuits, aiding and abetting the use of a firearm is virtually a strict-liability offense, subjecting the defendant to an enormous sentence enhancement even if he did not intend his confederate to use the firearm and did nothing to facilitate or encourage it—indeed, even if the defendant *discouraged* or sought to prevent its use.

This circuit conflict subjects defendants to disparate standards of proof and disparate punishment based on the happenstance of where prosecution occurs—disparities evident in this very case; if the drug transaction here had occurred near petitioner's home in Texas instead of the buyers' residence in Utah, a different rule would have governed. The conflict gives rise to disparities in punishment that are quite substantial. Petitioner's firearms conviction accounts for the vast majority of his sentence—120 of 168 months, or 71%. And yet the conviction—and its mandatory-minimum sentence—would be invalid in his home jurisdiction, and indeed, in *most* jurisdictions. This is an issue that arises *every day* in U.S. courts; more than two thousand Section 924(c) cases are prosecuted annually, and aiding and abetting liability is "routinely" charged with the offense, *Jordan* v. *United States*, 08-C-0209, 2008 WL 2245856, at *1 (E.D. Wisc. May 30, 2008) (citing *United States* v. *Golden*, 102 F.3d 936, 945 (7th Cir. 1996)). This Court's review is warranted.

1. The government presented evidence at trial that cooperating witness Vashti Perez arranged the

sale of one pound of marijuana in Tooele, Utah on August 26, 2007. According to Perez, her boyfriend's nephew, Ronald Joseph, and petitioner were the sellers. App., *infra*, 2a.

At approximately 9 pm, Perez, Joseph, and petitioner arrived at the agreed-upon location in Perez's car. The two buyers arrived soon afterwards. App., *infra*, 2a. One of the buyers approached Perez's car and got in the back seat. A short time later, the buyer struck an occupant of the car, grabbed the marijuana, and fled with the other buyer. As the buyers ran, shots were fired in their direction. Perez then drove off in pursuit of the buyers with Joseph and petitioner in her car. *Ibid.*

About one mile away, a police officer stopped Perez's car. The officer asked for permission to search the car, and Perez consented. The officer found no weapons or drugs. App., *infra*, 2a-3a.

2. Petitioner was charged with: (1) possession of marijuana with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); (2) discharging a firearm, or aiding and abetting the discharge of a firearm, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(A)(1) and 2; (3) two counts of unlawful ammunition possession, relating to a shell casing, in violation of 18 U.S.C. § 922(g)(1) and (g)(5)(A). Petitioner pleaded not guilty on all counts. App., *infra*, 3a, 12a.

a. At trial, Perez, Joseph, and the two buyers testified after receiving immunity from the government; some onlookers also testified. 2 C.A.

App. 245, 272, 295-296, 318. With one exception, all the witnesses testified that they did not see whether Joseph or petitioner had fired the shots; only Joseph—the other possible shooter—testified that petitioner had discharged a gun. Gov't C.A. Br. 2; App., *infra*, 3a. Although Perez had previously told police she thought petitioner fired a gun, she admitted at trial that she did not see who had fired because her back was turned. App., *infra*, 3a; 2 C.A. App. 285-287.

b. The government tried the Section 924(c) count on two alternative theories. First, the government argued that petitioner was the principal—*i.e.*, the shooter who discharged the firearm. Alternatively, the government argued that petitioner had aided and abetted Joseph's discharge of the firearm. App., *infra*, 1a, 4a-5a, 40a-41a.

The government and petitioner each submitted proposed jury instructions on the aiding and abetting theory. Petitioner proposed the following instruction:

> The defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant *intentionally took some action to facilitate or encourage the use of the firearm*.

1 C.A. App. 21 (emphasis added). The government proposed an instruction that did not require a showing that the defendant intended to facilitate or encourage the use of the firearm.

After extensive argument, the court accepted without material alteration the government's proposed instruction. The district court acknowledged that the issue was not well-settled, see 2 C.A. App. 199, and observed, "[i]f I'm wrong, you got a great issue for appeal and it's [the government's] fault." *Ibid.* The court instructed the jury that to find petitioner guilty of the Section 924(c) charge on an aiding and abetting theory:

> [Y]ou must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

App., *infra*, 7a; see also 1 C.A. App. 73-74 (Instr. No. 38).

During closing arguments, the government explained its theory of aiding and abetting:

> [Petitioner] would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking crime and [he] knowingly and actively participated in the drug trafficking crime. So if [petitioner] were to * * * argue that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.
>
> * * * [T]he evidence establishes that [petitioner] was involved in the drug trafficking crime. He is involved with the [drug] deal with [the

> buyer]. He certainly knew and actively participated in that crime.
>
> And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

App., *infra*, 33a-34a.

During deliberations, the jury sent a note asking whether aiding and abetting applied to "question 3 on the verdict form," App., *infra*, 40a, which asked the jury to determine whether petitioner had "carried," "used," "brandished," or "discharged" the firearm. *Id.* at 29a. The judge responded that the jury should answer question 3 if the jury found petitioner guilty under any theory. 3 C.A. App. 25; see also App., *infra*, 28a-30a. A short time later, the jury found petitioner guilty on all counts. The verdict form did not require the jury to indicate whether petitioner had been found guilty of the firearm offense as a principal or as an aider and abettor. App., *infra*, 29a.

c. The district court sentenced petitioner to 168 months of imprisonment, to be followed by 60 months of supervised release. App., *infra*, 15a, 18a. Although the Guidelines range for the other counts of conviction was 70-87 months of imprisonment, the court imposed a substantially reduced sentence of 48 months. In imposing a consecutive mandatory-minimum sentence for the Section 924(c) count, the district judge explained to petitioner that he had no choice: "I *have* to give you 10 years consecutive." 2

C.A. App. 37 (emphasis added); see also 18 U.S.C. § 924(c)(1)(A)(iii), (c)(1)(D)(ii).

3. The court of appeals affirmed. App., *infra*, 1a-11a. The court began its analysis by recognizing that, whatever the sufficiency of the evidence supporting liability as a principal, it was required to "address [petitioner's] challenge to the instructions the trial court gave the jury on the aiding-and-abetting theory because '[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one,'" *id.* at 6a (quoting *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam)), and the jurors had not been "required to specify under which theory they convicted" petitioner, *id.* at 5a.

The court rejected petitioner's argument that the aiding and abetting instruction was legally erroneous, relying on circuit precedent holding that a defendant need not take "some action to facilitate or encourage his cohort's use of the firearm" to be liable for the Section 924(c) firearm offense. App., *infra*, 9a. Instead, the court held it sufficient if the defendant "(1) knows his cohort used a firearm in the underlying crime [of violence or drug trafficking crime], and (2) knowingly and actively participates in that underlying crime." *Id.* at 8a (quoting *United States* v. *Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008)).

The court of appeals recognized that its holding "differs from the rules established by other courts"—in fact, the "vast majority" of them. App., *infra*, 9a-

10a (quoting *Bowen*, 527 F.3d at 1079). As the court acknowledged, "many of our sister circuits require the Government [to] prove not only (1) that an aider and abetter have knowledge that a cohort used a firearm * * *, but also that he (2) intentionally take some action to facilitate or encourage the use of the firearm." *Id.* at 9a. The court emphasized that because an earlier panel had adopted the minority view, it had "no authority to change our circuit's settled law on the subject." *Ibid.* (quoting *Bowen*, 527 F.3d at 1079).[1]

REASONS FOR GRANTING THE PETITION

There is an acknowledged conflict among the courts of appeals on whether aiding and abetting liability under 18 U.S.C. § 924(c) requires proof that the defendant facilitated or encouraged the principal's use of a firearm. The issue has important implications for the thousands of Section 924(c) prosecutions every year, which "routinely" allege aiding and abetting, *Jordan*, 2008 WL 2245856, at *1 (citing *Golden*, 102 F.3d at 945), because the view taken by the Sixth, Tenth, and D.C. Circuits significantly diminishes the government's burden of proof and increases the likelihood defendants will face the "severe penalties of § 924(c)," *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980). For imposition

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[1] The court of appeals declined to address petitioner's argument that there was insufficient evidence to support his conviction on the aiding and abetting theory because petitioner did not contest that there was sufficient evidence to convict him as the shooter. App., *infra*, 11a.

of such significant penalties to turn on the happenstance of where a crime is prosecuted undermines important "interest[s] in uniform and evenhanded sentencing." *United States* v. *Wilson*, 503 U.S. 329, 345 (1992). The decision below conflicts with the plain language of the aiding and abetting statute, 18 U.S.C. § 2, and basic principles of accomplice liability, subjecting less-culpable associates to the severe punishment Congress intended for more-culpable principals. As virtually every circuit has weighed in, there is no reason for further delay. This Court's review is warranted.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals On Whether Aiding And Abetting A Section 924(c) Violation Requires Proof The Defendant Facilitated Or Encouraged The Principal's Use Of A Firearm

The court of appeals recognized that "our standard for determining whether a defendant has aided and abetted another's use of a firearm during and in relation to a crime of violence [or drug trafficking crime] differs from the rules established by" the "vast majority of our sister circuits." App., *infra*, 9a-10a (quoting *Bowen*, 527 F.3d at 1079); see also *United States* v. *Baldwin*, 347 F. App'x 911, 912 (4th Cir. 2009) ("*Most circuits* require that the defendant intentionally facilitate or encourage another's use of a gun.") (emphasis added) (internal quotation marks omitted). Two other circuits likewise require only that the defendant participated in the underlying violent crime or drug trafficking crime and know that

his confederate used a firearm. The large majority of circuits—eight—require that the defendant knowingly or intentionally facilitated or encouraged the use of the firearm. This split is stark and widespread. Because eleven of the twelve regional circuits have already addressed the issue, it has been thoroughly considered and is ripe for this Court's review.

1. Three Circuits Have Held That Aiding And Abetting A Section 924(c) Violation Does Not Require Facilitating Or Encouraging The Use Of A Firearm

The Tenth Circuit first held in *United States* v. *Wiseman*, 172 F.3d 1196, 1217 (10th Cir. 1999), that a defendant need not facilitate the use of a firearm to be liable for aiding and abetting under Section 924(c), but that it was enough to have participated in the underlying crime with knowledge a confederate was carrying a gun. The sole rationale that the Tenth Circuit has identified for its rule is that one "need not participate in an important aspect of a crime to be liable as an aider and abetter." *Bowen*, 527 F.3d at 1078.

The Tenth Circuit not only has repeatedly reaffirmed its rule; it has broadened its application. While *Wiseman* involved a series of crimes where it was clear the defendant had advance knowledge that the principal would be using a firearm, 172 F.3d at 1217, more recent decisions of that court have upheld aiding and abetting convictions where it was at least ambiguous whether the defendant knew before the crime occurred that the principal was using or

carrying a firearm. See *United States* v. *Vallejos*, 421 F.3d 1119, 1125 (10th Cir. 2005). In this case, for example, there was no evidence (aside from the disputed testimony of the other possible shooter that petitioner fired the weapon) that petitioner knew of the firearm *before the moment of discharge*; the jury instruction required only that petitioner "knew his cohort used a firearm," App., *infra*, 7a, and the government explicitly argued it was enough that petitioner learned of the firearm at the moment it was discharged. See *id.* at 34a (arguing that petitioner had requisite knowledge because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it."); but see *United States* v. *Nelson*, 137 F.3d 1094, 1103 (9th Cir. 1998) (holding that, among other things, advance knowledge of the firearm is necessary to establish that the defendant aided or abetted the use of the firearm).

The Sixth Circuit similarly does not require proof of facilitation or encouragement. See, *e.g.*, *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007); *United States* v. *Franklin*, 415 F.3d 537, 554-55 (6th Cir. 2005). Under its rule, the government must prove only that (1) the defendant knew the principal was armed, and (2) the defendant "acted with the intent to assist or influence the commission of the underlying predicate crime" (*i.e.*, drug trafficking or a crime of violence). *Gardner*, 488 F.3d at 712.[2] Like

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[2] Although the Tenth Circuit's *Bowen* opinion erroneously cited *United States* v. *Robinson*, 389 F.3d 582, 591 (6th Cir.

the Tenth Circuit, the Sixth Circuit applies a standard that is tantamount to strict liability, authorizing aiding and abetting liability under Section 924(c) so long as the defendant is aware a confederate is carrying a firearm if the defendant was "present at the scene of the crime * * * during which his accomplice carries a firearm." *United States* v. *Hopson*, 134 F. App'x 781, 793 (6th Cir. May 20, 2004) (mem. op.).

Finally, the D.C. Circuit appears not to require facilitation or encouragement. The D.C. Circuit will sustain a conviction for aiding and abetting if "the defendant kn[ew] to a practical certainty" that a confederate would use the firearm in a manner prohibited by Section 924(c). *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997) (quoting *United States* v. *Powell*, 929 F.2d 724, 728 (D.C. Cir. 1991)). While the D.C. Circuit requires a heightened *mens rea* of "practical certainty," it does not require any intentional act of facilitation or encouragement. See *ibid.*

2004), as establishing that the Sixth Circuit requires proof of facilitation of the firearm offense, see *Bowen*, 527 F.3d at 1079 n.11, the Sixth Circuit has since made clear that it requires only that the defendant intended to assist or influence the commission of *the underlying predicate crime*, not the firearm offense. *Gardner*, 488 F.3d at 712; *Franklin*, 415 F.3d at 554-555. *Gardner* was quite explicit: "The government can meet [its] burden by showing that the defendant both [1] knew that the principal was armed and [2] acted with the intent to assist or influence the commission of *the underlying predicate crime*." 488 F.3d at 712 (emphasis added). That is distinct from requiring that the defendant have facilitated or encouraged the principal's *use, carrying, or discharge of the firearm*.

2. Eight Circuits Have Held That Aiding And Abetting A Section 924(c) Violation Requires Facilitating or Encouraging The Use Of A Firearm

"Most circuits require that the defendant 'intentionally facilitate or encourage'" the principal's use of the firearm to be convicted of aiding and abetting a Section 924(c) violation. *Baldwin*, 347 F. App'x at 912 (quoting *Bowen*, 527 F.3d at 1079). The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have held that the defendant must perform an act to facilitate or encourage the principal's use or carriage of the firearm; facilitation or encouragement of the underlying drug crime or crime of violence is not sufficient. See *United States* v. *Medina-Roman*, 376 F.3d 1, 6 (1st Cir. 2004); *United States* v. *Medina*, 32 F.3d 40, 45 (2d Cir. 1994); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999); *United States* v. *Sorrells*, 145 F.3d 744, 754 (5th Cir. 1998); *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam); *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758-759 (8th Cir. 2007); *United States* v. *Bancalari*, 110 F.3d 1425, 1429-1430 (9th Cir. 1997); *Bazemore* v. *United States*, 138 F.3d 947, 950 (11th Cir. 1998). Of those eight circuits, seven appear also to require that the defendant knowingly or intentionally facilitate or encourage the principal's use of the firearm. *Medina-Roman*, 376 F.3d at 6-7; *Medina*, 32 F.3d at 46-47; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753-754; *Daniels*, 370 F.3d at 691; *Rolon-Ramos*, 502 F.3d at 758; *Bancalari*, 110 F.3d at 1429-1430. While the Eleventh Circuit requires an act of facilitation, it has

not expressly adopted or rejected any requirement of knowledge or intent. See *Bazemore*, 138 F.3d at 950.

Under the majority view, a defendant does not aid and abet a violation of Section 924(c) simply because he participated in the underlying violent crime or drug trafficking crime and knew that the principal used or carried a firearm. As the Seventh Circuit has explained, "[t]he defendant must know, either before or during the crime, that the principal will possess or use a firearm, and then after acquiring knowledge intentionally facilitate the weapon's possession or use." *Daniels*, 370 F.3d at 691; accord, *e.g.*, *Medina-Roman*, 376 F.3d at 6; *Medina*, 32 F.3d at 45; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753-754; *Rolon-Ramos*, 502 F.3d at 758; *Bancalari*, 110 F.3d at 1429, *Bazemore*, 138 F.3d at 950. Those courts have held that, absent such proof, an aiding and abetting conviction cannot be sustained.

For example, the Second Circuit overturned a Section 924(c) conviction where the defendant "learned that [the principal] intended to carry a gun" during an armed robbery, but the government presented no evidence that the defendant "prompted or induced him to do so." *Medina*, 32 F.3d at 45. Judge Jacobs, writing for the court, reasoned that the principal was charged with "using or carrying a firearm during and in relation to a crime of violence," and that because "[t]his specific crime—not the robbery—is the crime that [the defendant] was charged with aiding and abetting * * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Ibid.* The

court specifically rejected the contention that the defendant could be convicted as an aider and abettor "merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the robbery itself" because "the language of [Section 2] requires proof that he performed some act that directly facilitated or encouraged *the use of the firearm*." *Ibid.* (emphasis added).

Similarly, the Ninth Circuit reversed the conviction of a defendant who "participated in [a] robbery *knowing the gun would be used*" because there was "no evidence that [the defendant] directly facilitated or encouraged the use of the firearm." *United States* v. *Nelson*, 137 F.3d 1094, 1104 (9th Cir. 1998) (emphasis added). That court has reasoned that "[t]he prosecution must still prove a specific intent to aid the firearms crime, *see Bancalari*, 110 F.3d at 1430, and some act that facilitates or encourages that crime." *Nelson*, 137 F.3d at 1103. Proof that the defendant facilitated the Section 924(c) firearm charge is necessary because "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the" underlying crime of violence or drug trafficking crime. *Bancalari*, 110 F.3d at 1429-1430 (holding that evidence must show the defendant "specifically intended to facilitate" the principal's use of the firearm, and simply "knowing" that the principal used the firearm does not establish the requisite specific intent); accord *Medina-Roman*, 376 F.3d at 6; *Daniels*, 370 F.3d at 691; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753.

The Fifth Circuit likewise has held that a defendant must both "share in the criminal intent to use the firearm during a drug trafficking offense" and "perform[] some affirmative act relating to the firearm." *Sorrells*, 145 F.3d at 753-754. That court reasoned that because an aider and abettor "is punished as a principal for 'using' a firearm in relation to a drug offense, [he] therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation." *Id.* at 754 (citing *Bazemore*, 138 F.3d 949-950)

The acknowledged circuit conflict over whether aiding and abetting a Section 924(c) violation requires proof the defendant facilitated the use of the firearm is well developed, and courts on both sides of the conflict have reaffirmed their positions. There is no justification for prolonging the disparate treatment of defendants prosecuted for this frequently charged offense. This Court's intervention is necessary to establish a uniform rule governing this recurring issue.

B. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance

1. The question presented here is unquestionably important. The government prosecutes a staggering number of Section 924(c) cases. Between 2008 and 2011, over 2,300 defendants were convicted of Section 924(c) violations *each year*, making Section 924(c) one of the most-common offenses carrying a mandatory-minimum sentence. U.S. Sent'g Comm'n, *Final*

Quarterly Data Reports 2008-2011, at 16; U.S. Sent'g Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("*Report to Congress*") 273, app. D tbl. D-3 (Oct. 2011). Those figures dwarf the number of convictions under the Armed Career Criminal Act (592 in 2010), *id.* at 282, a statute whose meaning this Court has addressed eight times since 2007. See U.S. Sent'g Comm'n, *Selected Supreme Court Cases on Sentencing Issues* 49 (July 2012). Because "aiding and abetting liability under 18 U.S.C. § 2 has been routinely applied in conjunction with 18 U.S.C. § 924(c) to convict individuals of aiding and abetting in using or carrying a firearm," *Jordan*, 2008 WL 2245856, at *1 (citing *Golden*, 102 F.3d at 945), whether such an offense requires proof the defendant facilitated the firearm's use is an issue of unquestionable importance.

The issue is of particular significance because sentences under Section 924(c) are "severe." *Busic*, 446 U.S. at 404 n.9. A mandatory-minimum consecutive sentence of five years attends each act of using or carrying a firearm, climbing to seven years if the firearm is brandished and ten years if discharged; harsh additional penalties apply for using particular types of firearms, and sentences for repeat offenders are a minimum of 25 years or, if particular weapons are involved, mandatory life imprisonment without possibility of parole. A district court cannot impose a sentence below these statutory minimums unless the government files a substantial-assistance motion. 18 U.S.C. § 3553(e); see U.S.S.G. § 5K1.1 cmt. 1 (2012). This lack of sentencing flexibility creates a grave risk

that a defendant's punishment under Section 924(c) will exceed his culpability. See, *e.g.*, *United States* v. *Ezell*, 417 F. Supp. 2d 667, 671, 673 (E.D. Pa. 2006) (offender received "unduly harsh" mandatory minimum 132-year sentence under Section 924(c), "far in excess of what is required to accomplish all of the goals of sentencing"). The risk of excessive sentences is particularly acute in jurisdictions, such as the Sixth and Tenth Circuits, where this additional liability can be predicated on nothing more than knowledge that a confederate participating in the underlying crime possesses a firearm. App., *infra*, 9a; *Gardner*, 488 F.3d at 712; see also *Harrington*, 108 F.3d at 1471.

The circuits' inconsistent application of Section 924(c) promotes sentencing disparities. Because mandatory-minimum sentences typically increase a sentence dramatically, the Sentencing Commission has recognized they pose a particular "risk of inconsistent application" that can yield dramatically different sentences. *Report to Congress* 360 nn.904-906, 365. To curb that risk, the Commission has counseled that mandatory-minimum sentences must "be applied consistently." *Id.* at 368. The acknowledged circuit conflict at issue here undercuts important interests in uniformity by subjecting one of the most common mandatory-minimum sentencing schemes to differing standards of proof. The implications of the split are on stark display in petitioner's case. Had the drug transaction occurred near petitioner's home in Texas, the government would have been required to show that petitioner intentionally acted to facilitate the firearm's use; but

because it occurred near the buyers' residence in Utah, it was enough that petitioner was "present and active at a drug deal when shots [we]re fired." App., *infra*, 34a.

2. This case presents a highly suitable vehicle for resolving the question presented. Throughout the proceedings, petitioner has preserved his claim that the jury instruction on aiding and abetting was legally erroneous because it did not require a finding of facilitation or encouragement. App., *infra*, 5a-10a; 1 C.A. App. 21; 2 C.A. App. 198-200. As the court of appeals noted, petitioner squarely raised this issue. See App., *infra*, 9a. The government relied on the "aiding and abetting" theory at trial, explicitly noting in closing its availability as a "theory upon which you could convict [petitioner]," *id.* at 33a, and emphasizing the minimal showing necessary under the Tenth Circuit's strict-liability standard, *ibid.* The jury evidently convicted on that theory: The jurors asked whether the aiding and abetting instruction applied to their determination of whether petitioner "discharged" a firearm, see *id.* at 40a, and returned a "guilty" verdict shortly after receiving an affirmative response.

C. The Tenth Circuit's Rule Is Wrong

1. Aiding And Abetting The Use Of A Firearm Requires Proof That The Defendant Facilitated Or Encouraged The Use Of The Firearm

The Tenth Circuit's rule is inconsistent with the plain language of the aiding and abetting statute and

fundamental principles of accomplice liability. The statute provides that whoever "aids, abets, counsels, commands, induces or procures [an offense], is punishable as a principal." 18 U.S.C. § 2(a). "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite * * *. In its legal sense, it means to encourage, advise, or instigate the commission of a crime." 1 Charles E. Torcia, *Wharton's Criminal Law* § 29, at 181 (15th ed. 1993). Each of the statute's verbs denotes an act of facilitation or encouragement—the defendant must have *done* something to promote the crime he is accused of aiding and abetting (here, the unlawful use a firearm under Section 924(c)). In addition, the statute also requires *intent* to facilitate or encourage. As Learned Hand long ago observed, "[a]ll the words used [in the statute]—even the most colorless, 'abet'—carry an implication of *purposive attitude*." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added); accord *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (adopting reasoning of *Peoni*); 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(b) (2d ed. 2003) ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.").[3]

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[3] See also *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753; *Bancalari*, 110 F.3d at 1430; *United States* v. *Loder*, 23 F.3d 586, 591 (1st Cir. 1994); *United States* v. *Lambert*, 995 F.2d 1006, 1008 (10th Cir. 1993).

Thus, this Court has held, "[c]riminal aiding and abetting liability under [18 U.S.C.] § 2 requires proof that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (quoting *Nye & Nissen*, 336 U.S. at 619). It is black-letter law, then, that there are two requirements of aiding and abetting liability under federal law: "[O]ne is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime." LaFave, *supra*, § 13.2.

The Tenth Circuit requires *neither*. Like the Sixth Circuit, see *Gardner*, 488 F.3d at 712, that court "only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime." App., *infra*, 9a. The Tenth Circuit does not require that the defendant "intentionally take some action to facilitate or encourage the use of the firearm." *Ibid.*

The decision below contravenes basic principles of accomplice liability. "Under the general principles applicable to accomplice liability, *there is no such thing as liability without fault*. Thus, it is not enough that the alleged accomplice's acts in fact assisted or encouraged the person who committed the crime." LaFave, *supra*, § 13.2(f) (emphasis added); see also *Hicks* v. *United States*, 150 U.S. 442, 449 (1893)

(finding error in the failure to instruct the jury that "the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting"). But in the Tenth Circuit and the other minority jurisdictions, the defendant is liable *even if* he did not intend for the principal to use the firearm and did nothing to facilitate or encourage it—indeed, the defendant could be liable even if he discouraged or sought to prevent its use. See *ibid.* This is quintessential strict liability.

It is not enough that the defendant "knowingly and actively participated in the [crime of violence or] drug trafficking crime." App., *infra*, 6a. Even if construed to mean an intent to facilitate the underlying crime, that is insufficient to support a Section 924(c) conviction. As the Second Circuit wrote in reversing a similarly flawed conviction, where a defendant is charged with aiding and abetting a confederate's "using or carrying a firearm during and in relation to a crime of violence," "[t]his specific crime—not the [underlying crime]—is the crime that [the defendant] was charged with aiding and abetting * * * [and] it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Medina*, 32 F.3d at 45; accord *Bancalari*, 110 F.3d at 1430 ("It is the firearm crime that [the defendant] is charged with aiding and abetting, not the [underlying crime].").

2. The Tenth Circuit's Holding Eviscerates The Required Connection Between Criminal Culpability And Punishment

The Tenth Circuit's rule also fails to respect the necessary connection between a defendant's criminal culpability and his punishment. "[A] basic 'precept of justice [is] that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Weems* v. *United States*, 217 U.S. 349, 367 (1910)). The decision below violates this basic precept because it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal.

When Congress enacted the modern aiding and abetting statute in 1909, it rejected common law distinctions between principals and accessories and instead treated both as principals. *Standefer* v. *United States*, 447 U.S. 10, 18-19 (1980). But implicit in that decision was the idea that those who would be sentenced as aiders and abettors would be equally deserving of punishment as principals. See *ibid.* Because the Tenth Circuit's standard does not require that the defendant facilitate or encourage the use of a firearm, it subjects accomplices to the draconian penalties of Section 924(c) for significantly less culpable conduct than Congress intended.

Because of the erroneous aiding and abetting instruction in this case, the government was able to obtain an additional *ten years* of punishment by proving just one fact beyond those necessary to prove

the underlying drug trafficking crime: that petitioner "knew his cohort" used or carried a firearm. App., *infra*, 7a-9a. That is too slender a reed on which to base such a significant sentence increase. As the Fifth Circuit has explained, "because the defendant is *punished as a principal* for 'using' a firearm in relation to a drug offense, [the defendant] therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation." *Sorrells*, 145 F.3d at 754 (emphasis added). Without this crucial link, the government can use an aiding and abetting theory to charge a defendant under Section 924(c) for conduct that would never establish culpability as a principal.

This case vividly illustrates how the minority rule divorces punishment from culpability. The Section 924(c) conviction increased petitioner's sentence from four years of imprisonment to *fourteen*. And yet there was no requirement that petitioner have any involvement besides "kn[owing] his cohort used a firearm in the drug trafficking crime," App., *infra*, 7a—even if he learned of its use only when the firearm was discharged. As the government aptly characterized the rule, it is enough if petitioner was "present and active at a drug deal when shots are fired." *Id.* at 34a. The minority rule thus permits a person convicted of aiding and abetting to be punished as a principal for conduct substantially less culpable than that of the person who actually used the firearm. That cannot be the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,

v.

JUSTUS CORNELIUS ROSEMOND, Defendant - Appellant.

No. 11-4046

Sept. 18, 2012

Appeal from the United States District Court for the District of Utah (D.C. No. 2:07-CR-00886-DAK-1).

Before KELLY, BALDOC, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant Justus Rosemond appeals his conviction for using a firearm during a federal drug-trafficking offense. The United States charged Rosemond with that offense under alternate theories, alleging that he was the principal (i.e., the person who fired a gun during a drug transaction) and, alternatively, that he aided and abetted a cohort who fired the weapon. Having jurisdiction under 28 U.S.C. § 1291, we conclude that the trial court properly instructed the jury on these alternate theories and that there was sufficient evidence to support the jury's guilty verdict. We, therefore, affirm Rosemond's conviction.

I. BACKGROUND

Viewed in the light most favorable to the Government, *see United States v. Burks*, 678 F.3d 1190, 1197 (10th Cir. 2012), the evidence at trial established the following: Vashti Perez brokered a deal for the sale of one pound of marijuana. The deal was to occur in a park in Tooele, Utah. The sellers were two males from out-of-town, Defendant Justus Rosemond and his cohort, Ronald Joseph. Joseph was the nephew of Perez's boyfriend. The buyer was a local Tooele resident, Ricardo Gonzales.

Just before 9:00 p.m. on August 26, 2007, Perez drove Rosemond and Joseph to the park, where they met Gonzales. Gonzales was accompanied by Cory Painter. Gonzales got into Perez's car with Perez, Rosemond, and Joseph, while Painter waited nearby, but outside the car.

Although Gonzales told Perez that he was interested in buying the marijuana, he actually did not have enough money to do so. Instead, he planned to steal the drugs. At some point during the transaction, then, Gonzales punched Rosemond in the face, grabbed the marijuana and ran from Perez's car. Painter, who was aware of Gonzales' plan, also ran, but in the opposite direction from Gonzales. The occupants of the car jumped out and one of them pulled out a nine-millimeter handgun and fired nine or ten shots at the fleeing Gonzales.

Gonzales and Painter got away. Perez, with Rosemond and Joseph, gave chase in the car. Their chase was soon thwarted, however, when a state

trooper stopped them because their vehicle matched the description of the car involved in the shooting, which bystanders had reported to police. With Perez's consent, the trooper searched her car but, finding no weapon, eventually let the three go. According to Joseph, the trooper did not find the gun because Rosemond had hidden it under the back seat of Perez's car.

At trial, every witness but one testified that they did not know who shot at Gonzales. Onlookers, as well as Gonzales and Painter, testified only that someone from the car fired the shots. Perez testified that it was either Joseph or Rosemond. But Perez had given police a written statement a few days after the incident, identifying Rosemond as the shooter. And Joseph testified at trial that Rosemond was the shooter.

The United States charged Rosemond with four offenses: 1) possession of marijuana, with the intent to distribute; 2) using and discharging a firearm during a federal drug-trafficking offense; 3) being a previously convicted felon in possession of ammunition; and 4) being an alien unlawfully in the United States in possession of ammunition. The jury convicted Rosemond of all four offenses. The district court sentenced Rosemond to forty-eight months in prison on Counts I, III, and IV, to run concurrently, and 120 months on Count II, to run consecutively to the other sentences, for a total of 168 months in prison.[1] On appeal, Rosemond challenges only his

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[1] 18 U.S.C. § 924(c)(1)(D)(ii) precludes a sentence for using the firearm during a federal drug-trafficking conviction from

conviction on Count II.

II. COUNT II

Count II specifically charged that Rosemond, "during and in relation to the drug trafficking offense set forth in Count I [possessing marijuana with the intent to distribute it], did knowingly use, carry, brandish and discharge a firearm, to wit, a 9mm handgun, and did aid and abet therein; in violation of 18 U.S.C. § 924(c)(1)(A) and 18 U.S.C. § 2." (R. v.1 at 18.) Section § 924(c)(1)(A) provides, in pertinent part, the following:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

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running concurrently with any other term of imprisonment, including a term of imprisonment for the underlying drug-trafficking crime.

Using or carrying a firearm in relation to a crime of violence or drug-trafficking offense, or possessing a firearm in furtherance of such an offense, are elements of the offense that the Government must prove to a jury beyond a reasonable doubt, while brandishing and discharging a firearm are sentencing enhancements that the Government must prove to the sentencing court by a preponderance of the evidence. *See Harris v. United States*, 536 U.S. 545, 549, 552-56, 568 (2002); *see also United States v. O'Brien*, 130 S. Ct. 2169, 2174, 2179 (2010); *Dean v. United States*, 556 U.S. 568, 571 (2009); *United States v. Bowen*, 527 F.3d 1065, 1072 (10th Cir. 2008).

18 U.S.C. § 2(a) provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

III. ANALYSIS

At trial, the district court instructed jurors on botn of the Government's theories, that Rosemond was the shooter and, alternatively, that he aided and abetted another's use of a firearm during the drug deal. Jurors found Rosemond guilty of Count II, but they were not required to specify under which theory they convicted. On appeal, Rosemond contends that 1) the trial court erred in the manner in which it instructed jurors on the aiding-and-abetting theory; and 2) there was insufficient evidence to support giving the aiding-and-abetting instruction.

A. The district court did not err in the manner in which it instructed jurors on the aiding-and-abetting theory

Rosemond does not challenge the trial court's instructions on the Government's theory that Rosemond was the shooter. Even if there was sufficient evidence on which the jury could have convicted Rosemond as the shooter, however, we must still address Rosemond's challenge to the instructions the trial court gave the jury on the aiding-and-abetting theory because "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam).

In considering Rosemond's challenge to the aiding-and-abetting instruction, "[w]e review de novo the jury instructions as a whole and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Prince*, 647 F.3d 1257, 1265 (10th Cir.) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 860 (2011).

After instructing jurors on the substantive offense of using or carrying a firearm in relation to a federal drug-trafficking offense, the court instructed on aiding and abetting another's use of a firearm during such a drug offense. In the specific instruction

Rosemond challenges here, the trial court told jurors the following:

> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

(*R. v. 1.* at 73-74 (Instruction 38).)

This instruction is correct under Tenth Circuit law, as established in three cases. In the first, *United States v. Wiseman*, 172 F.3d 1196 (10th Cir. 1999), Defendant Wiseman, with his cohort Martin, committed a series of armed robberies. *See id.* at 1201-04. During two of those robberies, Martin carried a Tec-9 firearm. *See id.* at 1217. A jury convicted Wiseman of aiding and abetting Martin's carrying the Tec-9 on those two occasions, in violation of § 924(c)(1)(A). *See* 172 F.3d at 1217. The Tenth Circuit rejected Wiseman's argument that there was insufficient evidence to support those convictions:

> To the extent that [Wiseman] argues that the evidence did not show that he aided and abetted Martin's conduct, he is wrong. To the contrary, the evidence was easily sufficient to show that Wiseman knowingly and actively participated in the robberies and that he knew that Martin was carrying the firearm. *See United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995) ("To be guilty of

> aiding and abetting, a defendant must willfully associate with the criminal venture and aid such venture through affirmative action.").

Id., 172 F.3d at 1217.

The second case, *United States v. Vallejos*, 421 F.3d 1119 (10th Cir. 2005), again addressed whether there was sufficient evidence to support a conviction for aiding and abetting another's using or carrying a firearm during a crime of violence. *See id.* at 1121. In addressing that question, *Vallejos* stated: "Aiding and abetting in the use of a firearm during a crime of violence under 18 U.S.C. § 924(c) requires proof that the defendant (1) knew his cohort used a firearm in the underlying crime and (2) knowingly and actively participated in that underlying crime." 421 F.3d at 1125 (citing *Wiseman*, 172 F.3d at 1217).

Most recently, in *United States v. Bowen*, in the context again of considering whether there was sufficient evidence to convict the defendant of aiding and abetting another's use of a firearm during a crime of violence, *see* 527 F.3d at 1069, 1075, this Court stated: "We have established that a defendant is liable [for] aiding and abetting the use of a firearm during a crime of violence if he (1) knows his cohort used a firearm in the underlying crime, and (2) knowingly and actively participates in that underlying crime." *Id.* at 1078 (citing *Wiseman* and *Vallejos*).

In light of these three cases, the district court correctly instructed jurors that, to convict Rosemond under § 924(c)(1)(A), they had to find that "(1) the

defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." (R. v.1 at 73-74 (Instruction 38).)

Rosemond argues that most other circuits require jurors to find, additionally, that the defendant took some action to facilitate or encourage his cohort's use of the firearm. We acknowledged that in *Bowen*:

> Bowen correctly points out that our standard for determining whether a defendant has aided and abetted another's use of a firearm during and in relation to a crime of violence differs from the rules established by other courts. Indeed, many of our sister circuits require the Government [to] prove not only (1) that an aider and abetter have knowledge that a cohort used a firearm in a crime of violence, but also that he (2) intentionally take some action to facilitate or encourage the use of the firearm. We currently only require that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence, and (2) knowingly and actively participated in that underlying crime. Thus, we have not required that a defendant's participation in the underlying crime directly facilitate the use of a firearm. Of course, this panel has no authority to change our circuit's settled law on the subject.

Bowen, 527 F.3d at 1079 (footnote, citations omitted). That is true for this panel, as well.

Nonetheless, in *Bowen*, we also reaffirmed the Tenth Circuit standard for § 924(c)(1)(A) convictions

for aiding and abetting another's use of a firearm by noting that, "[u]nder the approach taken by the vast majority of our sister circuits, the only additional prerequisite to aider and abetter liability, in this context, is that a defendant intentionally facilitate or encourage another's use of a gun. Little is required to satisfy the element of facilitation." 527 F.3d at 1079.

In an effort to avoid this Tenth Circuit authority, Rosemond argues that *Wiseman*, *Vallejos*, and *Bowen* all addressed the § 924(c)(1)(A) crime of using or carrying a firearm in connection with a *crime of violence*, while here, the United States charged Rosemond instead with the § 924(c)(1)(A) crime of aiding and abetting another's use of a firearm during a drug-trafficking offense. But he fails to cite any authority drawing such a distinction. And the language of the statute – "any person who, during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" --- does not suggest any reason to apply different standards of proof, depending on whether the offense involves a crime of violence or a drug-trafficking offense.

For these reasons, then, we conclude that the manner in which the district court instructed jurors on the Government's aiding-and-abetting theory was correct.

B. There was sufficient evidence to support Rosemond's conviction

Rosemond next argues that there was insufficient evidence presented at trial to support instructing the jury on the Government's aiding-and-abetting theory. We need not address this argument, however, because Rosemond concedes, as he must, that there was sufficient evidence to support his § 924(c)(1)(A) conviction under the Government's alternative theory that he was the shooter. That evidence included Joseph's testimony at trial that Rosemond was the shooter, and the written statement Perez gave police a few days after the incident identifying Rosemond as the shooter. And, as previously mentioned, Rosemond does not challenge the manner in which the trial court instructed jurors on the Government's theory that Rosemond was the shooter. Where then, as here, "there is sufficient evidence to support a conviction on one theory of guilt on which the jury was properly instructed, we will not reverse the conviction on the ground that there was insufficient evidence to convict on an alternative ground on which the jury was instructed." *United States v. Hillman*, 642 F.3d 929, 939-40 (10th Cir.) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 359 (2011); *see also Griffin v. United States*, 502 U.S. 46, 60 (1991).

IV. CONCLUSION

For the foregoing reasons, therefore, we AFFIRM Rosemond's conviction on Count II, using or carrying a firearm during the course of a federal drug-trafficking offense.

APPENDIX B

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
District of Utah

UNITED STATES OF AMERICA **v.** Justus Cornelius Rosemond	**JUDGMENT IN A CRIMINAL CASE** Case Number: DUTX2:07-CR-00886-001 DAK USM Number: 15718-081

Mark Gregersen
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): ___.
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[✓] was found guilty on count(s) 1s through 4s of the superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
21 U.S.C. § 841(b)(1)(D)	Possession With Intent to Distribute Marijuana

Offense Ended	Count
08/26/2007	1s

Title & Section	Nature of Offense
18 U.S.C. § 924(c)(1)(A)	Discharge of a Firearm in Relation to Drug Offense

Offense Ended	Count
08/26/2007	2s

Title & Section	Nature of Offense
18 U.S.C. § 922(g)(1)	Possession of Ammunition by a Convicted Felon

Offense Ended	Count
08/26/2007	3s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[✓] Count(s) 1 and 2 of the Indictment. [ ] is [✓] are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address

until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/1/2011
Date of Imposition of Judgment

/s/
Signature of Judge

Dale A. Kimball — U.S. District Judge
Name of Judge — Title of Judge

March 2, 2011
Date

AO 245B (Rev. 09/08) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Justus Cornelius Rosemond
CASE NUMBER: DUTX2:07-CR-00886-001 DAK

Judgment — Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

48 months as to Counts 1s, 3s, and 4s; 120 months as to Count 2s, to run consecutively for a total of 168 months. This sentence is to run concurrently with the sentence imposed in case 1:10-CR-00093 TC.

[✓] The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a federal correctional institution in the Houston, Texas area to facilitate family visitation, and that the defendant have the benefit of vocational training, particularly in computer installation, while incarcerated.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ [ ] a.m. [ ] p.m. on _____

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2:00 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Justus Cornelius Rosemond
CASE NUMBER: DUTX2:07-CR-00886-001 DAK

Judgment — Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

60 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

[✓] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

[ ] The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

[ ] The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: Justus Cornelius Rosemond
CASE NUMBER: DUTX2:07-CR-00886-001 DAK

Judgment — Page 4 of 6

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not illegally reenter the United States. In the event that the defendant should be released from confinement without being deported, he shall contact the U.S. Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the U.S. Probation Office in the District of Utah within 72 hours of arrival in the United States.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Justus Cornelius Rosemond
CASE NUMBER: DUTX2:07-CR-00886-001 DAK

Judgment — Page 5 of 6

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$0.00	$0.00

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

[ ] The defendant must make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*

Restitution Ordered		Priority or Percentage
TOTALS	$0.00	$0.00

[ ] Restitution amount ordered pursuant to plea agreement $____

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the

[ ] fine [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 6 — Criminal Monetary Penalties

DEFENDANT: Justus Cornelius Rosemond
CASE NUMBER: DUTX2:07-CR-00886-001 DAK

Judgment — Page 6 of 6

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [✓] Lump sum payment of $400.00 due immediately, balance due
[ ] not later than ___ , or
[ ] in accordance with [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C [ ] D, or [ ] F below); or

C [ ] Payment in equal ____ *(e.g., weekly, monthly, quarterly)* installments of $ ___ over a period of ___ *(e.g., months or years)*, to commence ___ *(e.g., 30 or 60 days)* after the date of this judgment; or

D [ ] Payment in equal ____ *(e.g., weekly, monthly, quarterly)* installments of $ ___ over a period of ___ *(e.g., months or years)*, to commence ___ *(e.g., 30 or 60*

days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within ___ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	**SPECIAL VERDICT**
vs.	**Case No. 2:07CR886DAK**
JUSTUS ROSEMOND,	
Defendant.	

We, the jury duly impaneled in the above-entitled case, find the defendant JUSTUS ROSEMOND:

1. As to Count I of the Superseding Indictment (Possession with Intent to Distribute Marijuana):

   _____ Not Guilty

   ___✓___ Guilty

   If you found Mr. Rosemond Not Guilty, do not answer Questions 2 & 3 and proceed to Question 4. If you found Mr. Rosemond Guilty, then answer Question 2.

2. As to Count II of the Superseding Indictment (Carrying, Using, Brandishing, or Discharging a Firearm During and in Relation to Drug Trafficking):

_____ Not Guilty

__✓__ Guilty

If you found Mr. Rosemond Not Guilty, do not answer Question 3 and proceed to Question 4. If you found Mr. Rosemond Guilty, then answer Question 3.

3. Having found Mr. Rosemond "Guilty" of Count II, please check all that apply:

__✓__ We find that the defendant "carried" the firearm;

__✓__ We find that the defendant "used" the firearm;

__✓__ We find that the defendant "brandished" the firearm;

__✓__ We find that the defendant "discharged" the firearm;

Please proceed to Question 4.

4. As to Count III of the Superseding Indictment (Possession of Ammunition by a Person Convicted of a Crime Punishable by Imprisonment for a term Exceeding One Year):

_____ Not Guilty

__✓__ Guilty

Please proceed to Question 5.

5. As to Count IV of the Superseding Indictment (Possession of Ammunition by an Illegal Alien):

_____ Not Guilty

__✓__ Guilty

DATED this 15 day of December, 2010.

/s/ _____

FOREPERSON

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case 2:07CR886
JUSTUS ROSEMOND,	)	
Defendant.	)	

BEFORE THE HONORABLE DALE A. KIMBALL

DECEMBER 15, 2010

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

CLOSING ARGUMENTS

* * * * *

THE COURT: We will now proceed with closing arguments. Ms. Travis, you may proceed with the closing arguments for the United States.

MR. [sic] TRAVIS: Thank you, Your Honor.

Ladies and gentlemen, you've now heard the evidence in this case, and it's time for you to assess that evidence in order to determine whether the United States of America has proven beyond a reasonable doubt that Justus Rosemond committed the crimes alleged in the superseding indictment.

Now, in her opening statement Ms. Fojtek told you that this case was about a shooting in Elton Park in the evening on August 26th, 2007. The case is about who did the shooting and why. With regards to the question of who, it is the government's contention that the evidence establishes beyond a reasonable doubt that it was the defendant Justus Rosemond who fired at least seven rounds from a 9 millimeter semi-automatic handgun the evening of August 26th, 2007. And why? Well, the evidence also establishes beyond a reasonable doubt that the gun was fired when Ricardo Gonzales stole the marijuana that Mr. Rosemond had brought to the park to sell.

So what is the government's evidence? Well, first I should explain that the government's evidence in connection with Count One segues into Count Two because as you will see in the special verdict form when you go back, you cannot convict Mr. Rosemond of Count Two unless you first find him guilty of Count One. And Judge Kimball explained that to you in the instructions.

If you find that the government has met its burden of proof in Count One, you will then proceed to determine whether each element of Count Two has been proven beyond a reasonable doubt. And as you look at Count One, I would submit to you that we

have established the elements of that crime beyond a reasonable doubt. How have we done that?

* * * * *

Now, ladies and gentlemen, you are well aware from the last two days that the government's position in this case is that the evidence establishes beyond a reasonable doubt that Justus Rosemond was the shooter the night of August 26th, 2007. You heard it in the opening statement by Ms. Fojtek, and you've been listening to me argue this point.

But there is, in fact, an alternative legal theory upon which you could convict Justus Rosemond of Count Two whether you're convinced he's the shooter or not, And that alternative legal theory is called aiding and abetting. And if you consider that theory, that is Instruction 38 that Judge Kimball read to you. That instruction states that Justus Rosemond would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking crime and that Justus Rosemond knowingly and actively participated in the drug trafficking crime. So if Mr. Rosemond were to somehow -- if Mr. Gregersen were to argue that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.

I would reiterate that the evidence establishes that Justus Rosemond was involved in the drug trafficking crime. He is involved with the deal with Ricardo Gonzales. He certainly knew and actively participated in that crime.

And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

* * * * *

And Mr. Gregersen wants you to think that somehow the government has abandon [sic] that position for the legal theory of aiding and abetting. We have not abandon [sic] that position. We are here because seven rounds were fired in a drug deal at Elton Park, and we're here because evidence establishes that this man did it. And the fact that I instruct you on [sic] alternative legal theory does not mean that the government is trying to somehow say that anything else happened than what happened with Justus Rosemond firing that weapon.

What we are saying is that under the law if there is some sort of thinking in your mind where you can't quite grasp onto him actually discharging the firearm, he is guilty of aiding and abetting anyone else with the discharge of that firearm because the facts establish that. It is a legal theory.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:07-CR-886DAK
	)	
JUSTUS ROSEMOND,	)	
	)	
Defendant.	)	
	)	

Transcript of Sentencing Hearing

BEFORE THE HONORABLE DALE A. KIMBALL

* * * * *

Salt Lake City, Utah, Tuesday, March 1, 2011

* * *

THE COURT: We're here this morning in the matter of the United States of America v. Justus Rosemond, 2:07-cr-886. The United States is represented by Ms. Veda Travis and Ms. Karin

Fojtik. The defendant is present and represented by his counsel, Mr. Mark Gregersen.

I've read the Presentence Report, the objections, the memo. You're suggesting, Mr. Gregersen, in your memo, if I understand it, that because there was a question about the possibility of aiding and abetting from the jury during the deliberations, that they didn't mean what they said later when they checked all four boxes?

MR. GREGERSEN: Judge, may I also ask if the court has the letters that were submitted.

THE COURT: Yes, I do.

MR. GREGERSEN: It is a bit akin to that. May I launch into that?

THE COURT: Yes, if you want to get up to the podium.

MR. GREGERSEN: I think that the jury did in its mind mean what it said. And then the question is what is the province of the jury and what is the province of the court, and it is the court's province to decide whether there will be an enhancement for brandishing or an enhancement for a discharge. And in looking at what a jury -- you know, what was behind it, and in some ways it's like legislative intent where in some respects it's speculation, but we do have some clues here, such as the jury asking the question if we find aiding and abetting, shall we proceed to the next jury instruction. And so I think that it is a consistent conclusion, even though we don't have a special verdict form that says whether it

was aiding and abetting or whether it wasn't, I think that's a consistent conclusion that they considered it to be aiding and abetting.

And then the next question is what is the ramification of that, that is, what should this court do in light of that. And that's the next part of my argument, if I may.

THE COURT: Sure.

MR. GREGERSEN: Here we have the Tenth Circuit stating a standard as to aiding and abetting when the underlying crime is a violence. And the court unfortunately has left the district courts in a vacuum as to what the standard should be when the underlying crime is a drug trafficking crime. The Tenth Circuit has said that when the underlying crime is a violence, then all that's necessary is that the defendant knew his cohort used a firearm and that the defendant knowingly and actively participated in that underlying crime of violence. Now, if the underlying crime is a violence, then the defendant, it can be argued, has already demonstrated an intent to associate with the crime of violence, that is, it can be implied or argued that the defendant has an intent as to violence such that he should bear the enhancement, say, and should be liable for associating himself with the underlying crime.

Here, where the Tenth Circuit has been silent as to our precise case that has the underlying crime of drug trafficking, the district court has had to guess or estimate what standard the Tenth Circuit would use,

whether they would use that -- whether the court should borrow that same standard that applies aiding and abetting underlying the crime of violence and use it for drug trafficking.

Now, the argument that I would make is that when the underlying crime is drug trafficking, then there is not that indicia of an intent toward violence that would be associated with the use of a gun, such that the enhancement -- that the enhancement for discharge should be used. And I think just as the vacuum of the Tenth Circuit has caused the district court to need to estimate what the standard is, I think that the district court also is placed in a position of reading in what then would be required in the absence of this underlying crime of violence, that is, where we have the underlying drug trafficking crime, what would be the implied standard, and whether a person should be in effect vicariously held liable without a specific intent to participate in the discharge of a firearm. And here under the circumstances of the jury with the indicia that they found aiding and abetting, and based on the court being in the position to determine whether there is proof that the defendant participated in the discharge of the weapon by a preponderance of evidence, and since the court has been in a position to observe the trial, we contend that that standard has not been met, and that the additional consecutive sentence should be limited to five years.

THE COURT: Thank you.

Ms. Travis.

MS. TRAVIS: Your Honor, we argued this exact issue prior to trial, and the court found that despite the fact the Tenth Circuit had been talking about a crime of violence that 924(c) is 924(c) and it applies to crimes of violence or drug trafficking crimes. And the court agreed with the government that 924(c) aiding and abetting would apply equally to drug trafficking as it would to a violent crime, and consequently the court instructed the jury under the Tenth Circuit law.

We'd also point out that in that situation then 924(c), the 924(c) applies here, and aiding and abetting is punished in the same way as the principal, and if aiding and abetting applies, then you have to impose the 10-year minimum mandatory because --

THE COURT: How clear is it do you think under Tenth Circuit law that drug trafficking is analogous to the crimes of violence?

MS. TRAVIS: Your Honor, my take on this is frankly that it would be ridiculous to make a distinction. They are you either possess, use, carry, discharge a firearm in a crime of violence when you do it in connection with drug trafficking. There has never been any distinction as to how those two are applied. The fact is we just have one case that dealt with a crime of violence. The Tenth Circuit talked about aiding and abetting. That was fact specific to that case. It happened to be a crime of violence case. I think if the Tenth Circuit had intended that it wouldn't apply to drug trafficking, there would be some dicta in there that would say, well, we're saying this about aiding and abetting a crime of violence, but

we don't think that this exactly would apply in drug trafficking. They didn't make any such statement. And the statute is very clear, and the jury found discharge. The court instructed the jury on aiding and abetting, and consequently I think there is absolutely no -- I mean this issue's going to go on appeal, and at this point in time, the instruction to the jury was exactly what the government is arguing and what the PSR says that the defendant is subject to the 10-year minimum mandatory because the jury found discharge.

THE COURT: Does the jury question, in your view, change the argument at all?

MS. TRAVIS: The jury question with regard to --

THE COURT: The question about -- what was it -- there was a question during the deliberations about if you find aiding and abetting, do you still go ahead and answer question 3 on the verdict form, does that change the analysis in your view at all?

MS. TRAVIS: It doesn't to me because I still don't think we know what the jury -- what the basis for their verdict was.

THE COURT: We don't.

MS. TRAVIS: We don't.

THE COURT: We do know they checked the boxes, that's one thing we do know.

MS. TRAVIS: That's correct, they checked the boxes. Aiding and abetting -- an aider and abetter has equal liability to a principal. Whether they found

that Ronald Joseph fired the gun or they believe that Justus Rosemond fired the gun, they found the defendant guilty of the 924(c) violation and they found that the gun had been discharged, and that's the 10-year minimum mandatory, and that would be our position.

* * * * *

OPPOSITION BRIEF

SUPREME COURT, U.S.
FILED
APR 24 2013
OFFICE OF THE CLERK

No. 12-895

In the Supreme Court of the United States

JUSTUS CORNELIUS ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant may be convicted of aiding and abetting the use or carrying of a firearm during and in relation to a drug trafficking offense, 18 U.S.C. 924(c) and 2, if the defendant actively participated in a drug trafficking offense and knew that an accomplice used or carried a firearm in the commission of that offense.

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In the Supreme Court of the United States

No. 12-895

JUSTUS CORNELIUS ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 16, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of possessing marijuana with intent to distribute it and aiding and abetting, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm and

aiding and abetting, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). Pet. App. 28a-30a; 1 C.A. App. 17-19. He received concurrent sentences of 48 months of imprisonment on Counts 1, 3, and 4 and a consecutive sentence of 120 months of imprisonment on Count 2, to be followed by five years of supervised release. Pet. App. 15a, 18a. The court of appeals affirmed. *Id.* at 1a-11a.

1. On the evening of August 26, 2007, petitioner attempted to sell one pound of marijuana to Ricardo Gonzales. Pet. App. 2a. Accompanied by two other individuals, petitioner drove to meet Gonzales and Gonzales's "wingman" Cory Painter, and Gonzales entered their vehicle to inspect the marijuana. *Ibid.* At some point during the transaction, Gonzales punched petitioner and absconded with the marijuana, while Painter ran in the opposite direction. *Ibid.* As Gonzales fled, one of the three occupants of the vehicle fired several shots from a nine-millimeter handgun at him. *Ibid.*

Petitioner and his two accomplices then set out after Gonzales in the vehicle, but they were stopped a short time later by a state trooper. Pet. App. 2a-3a. After obtaining consent, the trooper searched the vehicle but did not find a firearm. *Id.* at 3a.

2. a. Petitioner was indicted in the United States District Court for the District of Utah on one count of possessing marijuana with intent to distribute it and aiding and abetting, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm and aiding and abetting, in violation of 18 U.S.C. 924(c) and 2 (Count 2);

one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). 1 C.A. App. 17-19.

During trial, one of petitioner's accomplices testified that petitioner had been the one who had fired shots at Gonzales. Pet. App. 3a. The other accomplice, who had driven the vehicle, testified that she was not sure which of the other two men had fired the gun. That individual, however, had given a written statement shortly after the incident identifying petitioner as the shooter. *Ibid.* One of the accomplices also testified that the state trooper had not found the firearm after stopping the vehicle because petitioner had concealed it, and the trooper testified that petitioner had been "moving around a lot in the vehicle," in contrast to the other two occupants of the car, who had remained still. 2 C.A. App. 151; see also *id.* at 150; *id.* at 164 (testimony regarding Gov't Ex. 18, a video recording of the stop showing petitioner turning toward the back seat).

b. Petitioner and the government proposed different jury instructions with respect to aiding and abetting the Section 924(c) offense (Count 2). Petitioner's requested instruction stated that "[t]he defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant intentionally took some action to facilitate or encourage the use of the firearm." 1 C.A. App. 21. The government proposed an instruction that would require the jury to find that "the defendant knew his cohort used a firearm in the drug trafficking crime" and "the defendant knowingly and active-

ly participated in the drug trafficking crime"—but not necessarily that he had taken action to facilitate or encourage the use of the firearm specifically. *Id.* at 26.

The district court adopted the government's instruction. It accordingly instructed the jury in relevant part:

> In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly seeks by some act to help make the crime succeed.
>
> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime.

1 C.A. App. 73-74; Pet. App. 7a.

Consistent with the indictment, the district court did not instruct the jury on aiding-and-abetting liability with respect to Counts 3 and 4, which charged petitioner with unlawful possession of ammunition. See 1 C.A. App. 75-84.

c. In its summation, the government argued principally that "the evidence establishes beyond a reasonable doubt that it was [petitioner] who fired at least seven rounds from a 9 millimeter semi-automatic handgun the evening of August 26, 2007." Pet. App. 32a. It also advanced the "alternative legal theory" that the jury could convict petitioner for aiding and abetting the Section 924(c) offense. *Id.* at 33a. Under that theory, the government explained, if one of petitioner's accomplices had "fired the gun, [petitioner is] still guilty of the crime

* * * based on the evidence before you." *Ibid.* Petitioner "certainly knew and actively participated" in a drug trafficking offense, the government argued, and "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." *Id.* at 33a-34a.

With respect to the two counts for unlawful possession of ammunition, the government argued that because the evidence established that petitioner had possessed the firearm, "he had to have also possessed the cartridge cases that were inside the 9 millimeter." 11/16/11 Trial Tr. 24.

d. The jury found petitioner guilty on all four counts. The verdict form, however, did not require the jury to indicate whether it found petitioner guilty under an aiding-and-abetting theory on Count 2. Pet. App. 28a-30a.[1]

The district court imposed a sentence of concurrent terms of 48 months of imprisonment on Counts 1, 3 and 4. It also imposed a mandatory consecutive 120-month sentence on the Section 924(c) offense, to be followed by five years of supervised release. See Pet. App. 15a, 18a; see 18 U.S.C. 924(c)(1)(A)(iii) and (D)(ii).

3. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioner's argument that the dis-

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[1] During deliberations, the jury sent a note to the judge asking whether "aiding and abetting appl[ied] to Question Three" on the verdict form, 3 C.A. App. 24 (capitalization altered), which set forth four sub-questions asking the jury to determine whether petitioner had "used," "carried," "brandished," or "discharged" a firearm, Pet. App. 29a. The court instructed the jury to answer Question 3 if the jury found petitioner guilty of Count 2 under any theory. 3 C.A. App. 25. The jury found all four of the alternatives listed in Question 3. Pet. App. 29a.

trict court's instruction on aiding and abetting the Count 2 offense was erroneous. *Id.* at 6a-10a. Based on its prior decisions approving the relevant language, the court of appeals concluded that the district court's instruction was correct. See *ibid.* (citing *United States* v. *Bowen*, 527 F.3d 1065, 1078-1079 (10th Cir. 2008), cert. denied, 555 U.S. 930 (2008); *United States* v. *Vallejos*, 421 F.3d 1119 (10th Cir. 2005); *United States* v. *Wiseman*, 172 F.3d 1196 (10th Cir.), cert. denied, 528 U.S. 889 (1999)).

The court of appeals acknowledged that other circuits "require jurors to find * * * that the defendant took some action to facilitate or encourage his cohort's use of the firearm" to convict a defendant of aiding and abetting a Section 924(c) offense. Pet. App. 9a. But it explained that under those courts' precedents, "[l]ittle is required to satisfy the element of facilitation." *Id.* at 10a (quoting *Bowen*, 527 F.3d at 1079).

ARGUMENT

The court of appeals correctly rejected petitioner's argument that the district court's aiding-and-abetting instruction was erroneous. Petitioner contends (Pet. 9-25) that review is warranted because the circuits are divided over whether aiding and abetting a Section 924(c) offense requires proof that the defendant facilitated or encouraged the principal's use of a firearm. But whatever technical disagreement exists among the circuits on that question appears at this time to have little practical significance. Even in those circuits requiring proof of facilitation, "once knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element." *United States* v. *Bennett*, 75 F.3d 40, 45 (1st Cir.), cert. denied, 519 U.S. 845 (1996).

In any event, this is an unsuitable vehicle to address the question presented, because it is clear beyond a reasonable doubt that petitioner would have been convicted even if the jury had received the instruction adopted by other circuits. Most clearly, the jury found petitioner guilty on Counts 3 and 4, which charged him only as a principal with unlawfully possessing the ammunition that was loaded into the discharged firearm. The government's only theory for those counts was that petitioner had possessed the firearm (and so had necessarily possessed the ammunition fired from the gun). That would qualify as aiding and abetting under any circuit's standard. Accordingly, further review is not warranted.

1. The court of appeals correctly concluded that a person can be guilty of aiding and abetting a Section 924(c) offense without having encouraged or facilitated the use of a firearm, so long as he actively participated in the underlying offense and knew of the principal's use or carrying of a firearm in the commission of that offense.

The federal aiding-and-abetting statute, 18 U.S.C. 2(a), provides that "[w]hoever commits an offense against the United States or aids [or] abets, counsels, commands, induces or procures its commission, is punishable as a principal." This Court has explained that the statute "requires proof that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (quoting *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)) (brackets in original).

Accordingly, as the district court instructed the jury in this case, in order to find a defendant guilty of aiding and abetting an offense, a jury must find that the defendant "willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly [sought] by some act to help make the crime succeed." 1 C.A. App. 73-74; see, *e.g.*, *United States* v. *Broadwell*, 870 F.2d 594, 608 (11th Cir.), cert. denied, 493 U.S. 840 (1989). But importantly, "[t]o be convicted of aiding and abetting, participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result." *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir.) (citation omitted), cert. denied, 523 U.S. 1143 (1998).

In light of those principles, the district court's instruction on aiding and abetting the Section 924(c) offense was correct. Section 924(c) subjects to criminal punishment "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm." 18 U.S.C. 924(c)(1)(a). That offense has two elements: "First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.'" *Smith* v. *United States*, 508 U.S. 223, 228 (1993). "Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'" *Ibid.* When a person actively participates in the underlying crime of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense. And when he does so with the knowledge of the principal's use or carrying of a firearm during the commission of the crime, he has plainly "participate[d] in [the Section 924(c) offense] as in something that he wishe[d] to

bring about." *Central Bank of Denver*, 511 U.S. at 190 (citation omitted; brackets in original).

Petitioner's contention (Pet. 24) that the decision below "[e]viscerates" the link between culpability and punishment has no basis. Petitioner has offered no persuasive reason why those who actively participate in drug deals, robberies, or other violent crimes with the knowledge that an accomplice has brought along a firearm are not "equally deserving of punishment as principals" under Section 924(c). *Ibid.* Given that the chief legislative objective of principal liability under Section 924(c) is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting 114 Cong. Rec. 22,231 (1968)), it only makes sense that his accomplices in the commission of the felony should also be deterred from participating in the criminal enterprise when they know of their confederate's use or carrying of a firearm. And petitioner simply misstates the holding below in asserting that "there was no requirement that petitioner have any involvement besides 'kn[owing] his cohort used a firearm in the drug trafficking crime.'" Pet. 25. To the contrary, the government was required to prove that petitioner "knowingly and actively participated in the drug trafficking crime." Pet. App. 7a (quoting 1 C.A. App. 73-74). That conduct, in conjunction with knowledge of an accomplice's use or carrying of a firearm, amply supports aiding-and-abetting liability.

Petitioner suggests (Pet. 11-12) that the Tenth Circuit has adopted a rule allowing conviction on an aiding-and-abetting theory even where the defendant has no "advance knowledge" of the firearm. But the absence of *advance* knowledge does not defeat a defendant's culpability. A defendant cannot be convicted under the court

of appeals' rule unless he had knowledge of the firearm before the underlying crime was *completed*. The Tenth Circuit has upheld convictions for aiding and abetting a Section 924(c) offense only where the defendant continued to participate in the underlying drug trafficking offense or crime of violence after learning of the firearm,[2] and no decision of that court has suggested that a defendant could be convicted if he does not learn of the use or carrying of a firearm until after the underlying crime is completed. Accord *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996) (holding that even if defendant did not have "advance" knowledge that his codefendant was going to use a gun during the robbery, he could be convicted of aiding and abetting a Section 924(c) offense if he "was aware that the gun was being used while he continued to participate in the robbery").

2. Petitioner is correct (Pet. 14-17) that other circuits have required the government to prove that the defendant encouraged or facilitated the principal's use of a firearm in order to obtain a conviction for aiding and abetting a Section 924(c) violation. But because "[l]ittle is required to satisfy the element of facilitation" under those precedents, Pet. App. 10a (citation omitted), the

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[2] Here, for example, it is clear that petitioner continued to participate in the drug trafficking offense after the discharge of the firearm through his subsequent pursuit of Gonzales, who had just fled with petitioner's marijuana without paying for it. Similarly, in *United States* v. *Vallejos*, 421 F.3d 1119 (10th Cir. 2005), the court of appeals determined that the defendant was liable for aiding and abetting a Section 924(c) offense because he had continued to participate in a carjacking after the principal had brandished a firearm. See *id.* at 1126.

difference between the formulations appears to have minimal practical significance at this time.[3]

As the Eleventh Circuit explained in *Bazemore* v. *United States*, 138 F.3d 947 (1998) (cited Pet. 14), "once knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element." *Id.* at 950 (citation omitted). That understanding has been echoed by other circuits. See *Bennett*, 75 F.3d at 45 ("[O]nce knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element."); *United States* v. *Isaacs*, 257 Fed. Appx. 704, 708 (5th Cir.) (same), cert. denied, 549 U.S. 1015 (2006); *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam) (same). In *Bazemore*, for example, the Eleventh Circuit held that the evidence of facilitation was sufficient because the defendant was "the owner and driver of the automobile which carried both [the principal] and the gun to the drug deal" and had "exited the vehicle to inspect the marijuana * * * under the watchful eye of his armed coconspirator." 138 F.3d at 950. The court concluded

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[3] At least two other courts of appeals appear to apply the same instruction as the court below. See Pet. 12-13; see also *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007) (explaining that the "government can meet" its burden of demonstrating aiding-an-abetting liability for a Section 924(c) offense "by showing that the defendant both knew that the principal was armed and acted with the intent to assist or influence the commission of the underlying predicate crime"); *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997) (explaining that a conviction for aiding and abetting a Section 924(c) offense may stand "only if the jury was presented with evidence showing that the defendant 'kn[ew] to a practical certainty' that the principal would 'use' a weapon in the ways prohibited by section 924(c)") (quoting *United States* v. *Powell*, 929 F.2d 724, 729 (D.C. Cir. 1991)).

that a person "cannot knowingly benefit from the protection afforded by the firearm carried by his companion and then subsequently evade criminal liability for its presence." *Ibid.*

The Seventh Circuit has enumerated "several examples of conduct that will satisfy the facilitation element, including transporting the principal and firearm to the scene of the crime, encouraging others to use a gun in the commission of the underlying crime, and benefitting from the use of a gun." *Daniels*, 370 F.3d at 691. Thus, courts of appeals adopting petitioner's preferred instruction have found facilitation based on such conduct as holding a bag and obtaining cash after an accomplice brandishes a weapon, *Price*, 76 F.3d at 529-530; handing drugs to a buyer and collecting payment after an armed accomplice leads the buyer to the defendant and stands nearby during the transaction, *Daniels*, 370 F.3d at 691-692; and locking a door to prevent a victim from leaving with the knowledge that an accomplice is carrying a firearm, *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758 (8th Cir. 2007).

Petitioner places significant weight on the Second Circuit's decision in *United States* v. *Medina*, 32 F.3d 40 (1994). But in that case, the court deemed it critical that the defendant, unlike petitioner, was not present during the underlying crime of violence (a robbery), but rather had served in only a planning role in which he did not encourage the use of the specific firearms that were employed in the robbery. See *id.* at 42, 45-47. The Second Circuit made clear that had he actually been present during the robbery, it would have been required to "consider whether his conduct at the scene facilitated or promoted the carrying of a gun, or whether he benefit-

ted from the gun's use so that he could be said to constructively possess the weapon." *Id.* at 46.

Thus, in practice, the facilitation element required by other circuits is generally met by a defendant's participation in the underlying crime with knowledge that the principal is armed, so long as the defendant somehow benefitted from the use of the weapon. Where a defendant actively participates in a drug deal or other planned criminal activity with the knowledge that an accomplice is armed, that standard will generally be satisfied. See *United States* v. *Bowen*, 527 F.3d 1065, 1080 (10th Cir.) (concluding with "no difficulty" that other circuits' facilitation requirement would have been met), cert. denied, 555 U.S. 930 (2008). At this time, therefore, the division of authority appears to be largely academic and does not merit this Court's intervention.

3. Even if the question presented were worthy of this Court's review, this case would not be a suitable vehicle in which to resolve it, because it is clear beyond a reasonable doubt that the jury would still have convicted petitioner on Count 2 if the trial court had given his favored instruction. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam) ("[H]armless-error analysis applies to instructional errors so long as the error at issue does not categorically 'vitiat[e] *all* the jury's findings.'") (citation omitted); accord *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010). Indeed, in arguing that this case presents a proper vehicle to consider the question presented (Pet. 20), petitioner does not contend the jury's verdict would have been different had the alleged instructional error not occurred.

a. Assuming that the jury did not find that petitioner was the shooter (but see p. 15, *infra*), there is no doubt that the jury would have concluded that petitioner "di-

rectly facilitated or encouraged the use or carrying of a firearm" by one of his accomplices. *Medina*, 32 F.3d at 45. The jury found petitioner guilty on Counts 3 and 4, which charged him with unlawful possession of ammunition based on his possession of shell casings matching the firearm that was fired at Gonzales. See Pet. App. 29a-30a; 1 C.A. App. 18-19. Because neither of those counts relied on an alternative aiding-and-abetting theory, the jury necessarily concluded that petitioner had personally possessed the ammunition. And the government's only argument to the jury on those counts was that because the evidence established petitioner's "possession of the 9 millimeter firearm," it necessarily "establishe[d] beyond a reasonable doubt that he had to have also possessed the cartridge cases that were inside the 9 millimeter that he possessed." 11/16/11 Trial Tr. 24; see also *ibid.* ("So based on the government's evidence regarding the defendant's possession of the firearm and, therefore, his necessary possession of the cartridge cases, * * * I would ask you also to return a verdict of guilty on Counts Three and Four."). That conduct—possession of the firearm and the ammunition discharged from it—would qualify as facilitation of the use of the firearm even if petitioner was not the one who ultimately pulled the trigger. The jury's guilty verdict on Counts 3 and 4 therefore demonstrates that the alleged instructional error on Count 2 was harmless beyond a reasonable doubt. See, *e.g.*, *United States* v. *Jefferson*, 674 F.3d 332, 362 (4th Cir.) ("[T]he jury's guilty verdict on Counts 3 and 4—the two substantive bribery offenses—demonstrates beyond a reasonable doubt that Jefferson was guilty under the valid bribery theory underlying Counts 1, 6, 7, 10, and 16, and that the *Skilling* error in the jury instructions was necessarily

harmless."), cert. denied, 133 S. Ct. 648 (2012); *United States* v. *Green*, 254 F.3d 167, 170 (D.C. Cir. 2001) ("In numerous cases we have found *Bailey* errors to be harmless * * * where, although there was instructional error as to the 'using or carrying' charge, a conviction on another statutory count assured us that the jury had necessarily found the element as to which the jury had been mischarged.").

Moreover, it is undisputed at this stage that after Gonzales fled with the marijuana, petitioner or one of his accomplices fired shots at Gonzales, and then all three of them pursued Gonzales in the vehicle before being stopped by the state trooper. See Pet. 4; see also Pet. C.A. Br. 17 ("[I]t is clear that after the marijuana was taken, whoever fired the gun immediately got out of the car and commenced shooting.").[4] At minimum, therefore, petitioner continued pursuing Gonzales, who had just stolen marijuana from him, with the knowledge that his accomplice had already fired shots at Gonzales. Petitioner thereby "benefit[ed] from the use of a gun" in the same sense as other defendants for whom courts of appeals have found the facilitation element satisfied. *Daniels*, 370 F.3d at 691. Cf., *e.g.*, *Price*, 76 F.3d at 529-530 (finding evidence of facilitation "overwhelming" where defendant put stolen money into a bag while principal pointed a firearm).

b. In any event, the trial evidence established beyond doubt that petitioner was the shooter, and thus any error in the aiding-and-abetting instruction was harmless for that reason as well. See *Hedgpeth*, 555 U.S. at 61. Petitioner was the only person identified by any

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[4] Petitioner's trial counsel argued that Gonzales or Painter may have fired the gun, see 11/16/11 Trial Tr. 29, but the jury's guilty verdict on Count 2 necessarily rejected that theory.

witness as the shooter. The jury found beyond a reasonable doubt that petitioner had possessed the ammunition that was discharged from the firearm, and the only basis for that finding urged by the government was that petitioner had possessed the firearm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2013

REPLY BRIEF

MAY 7 - 2013

No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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1 Charles E. Torcia, *Wharton's Criminal Law*
(15th ed. 1993) 7

Wayne R. LaFave, *Substantive Criminal Law*
(2d ed. 2003) 11

William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) 2

U.S. Dep't of Justice, *Attorney's Manual*,
Title 9, Criminal Resource Manual (1997) 6, 7

U.S. Sentencing Comm'n,
Final Quarterly Data Reports 2008-2011 1

REPLY BRIEF FOR PETITIONER

A. The Acknowledged Circuit Split Is Important

1. For all its rhetoric, the government does not contest that this case concerns a frequently recurring issue that has split the courts of appeals. It concedes (Opp. 10) that courts are sharply divided about whether "the government [must] prove that the defendant encouraged or facilitated the principal's use of a firearm in order to obtain a conviction for aiding and abetting a Section 924(c) violation," *ibid.*, or whether it suffices to prove, as the Tenth Circuit and a minority of other courts of appeals have held, that "the defendant knowingly and actively participated in the drug trafficking crime" while knowing a confederate possessed a firearm, *id.* at 3-4 (quoting 1 C.A. App. 26). And it does not deny (see Pet. 17-18) that this issue arises frequently in federal courts: Over 2,300 defendants are convicted of violating Section 924(c) *each year*, U.S. Sentencing Comm'n, *Final Quarterly Data Reports 2008-2011*, at 16, and "aiding and abetting liability under 18 U.S.C. § 2 has been routinely applied in conjunction with 18 U.S.C. § 924(c) to convict individuals of aiding and abetting in using *** a firearm," *Jordan* v. *United States*, No. 08-C-0209, 2008 WL 2245856, *1 (E.D. Wis. May 30, 2008).

Instead, the government attempts to brush aside the issue as unimportant, because purportedly it "does not take much to satisfy the facilitation element." Opp. 6 (quoting *United States* v. *Bennett*, 75 F.3d 40, 45 (1st Cir.), cert. denied, 519 U.S. 845

(1996)). But the government's self-serving claim is belied by how vigorously it litigates this issue whenever and wherever it arises, including in this very case, demonstrating that the government full well appreciates how its burden of proof is eased by the minimal showing necessary under the minority rule.[1] Under it, the government can obtain an additional term of imprisonment of from five years to life without parole by proving just a *single element* beyond what is necessary to establish the underlying drug trafficking crime or crime of violence: that the defendant "knew his cohort" used or carried a firearm, Pet. App. 7a-9a—even if, the government acknowledges, "the defendant has no *advance* knowledge" that his confederate is armed and learns too late to dissuade his confederate "to leave his gun at home," Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)). This is to say nothing about the vast majority of cases that do not go to trial, in which the government is able to exploit the trivial showing of the minority rule to strong-arm a guilty plea, since "defendants often respond to easily proved charges by pleading guilty." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 520 (2001). The government's assertion is further belied by its calculated, and repeated, hedging that further review is not warranted "*at this time*," Opp. 6, 11, 13

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[1] *See, e.g.*, U.S. Br. at 42-43, *United States* v. *Jackson* (11th Cir.), Nos. 12-16046, 12-16045 (Apr. 3, 2013), 2013 WL 1543254; U.S. Br. at 44-45, *United States* v. *Tubbs*, 463 F. App'x 706 (9th Cir. 2011) (No. 09-10149), 2011 WL 2617483; U.S. Br. at 12, *United States* v. *Baldwin*, 347 F. App'x 911 (4th Cir. 2009) (No. 08-5226), 2009 WL 1765187; U.S. Br. at *16, *20, *United States* v. *Bowen*, 527 F.3d 1065 (10th Cir. 2008) (No. 07-1216), 2007 WL 4778855.

(emphasis added), suggesting that the issue will promptly become certworthy in the government's eyes when it arises from one of the circuits where it loses convictions under the majority rule.

2. The government suggests that the majority rule's "facilitation" requirement is satisfied where a defendant has passively "benefitted" from a confederate's "use of the weapon" (Opp. 13; see also *id.* at 12) while he continues to participate in an underlying offense, without acting affirmatively to encourage use of the firearm. But it quietly acknowledges that not all courts have adopted such a minimal—and atextual, see pp. 7-8, *infra*—showing. See Opp. 13 (stating that this showing is only "generally" accepted). That even the courts following the majority rule disagree about its application only underscores the need for this Court's review. And, in fact, the government is only able to maintain that the disagreement is unimportant by ignoring cases that undeniably conflict with its preferred variant of the majority rule: It conspicuously fails to address numerous cases discussed in the petition, which make plain that other circuits have rejected the government's view—and have adopted a position under which petitioner's conviction would unquestionably be invalid.

The Ninth Circuit, for example, has repeatedly rejected the idea that it is enough for a defendant to actively participate in the underlying drug offense while knowing that a gun will be used. In *United States* v. *Nelson*, 137 F.3d 1094 (9th Cir. 1998), the court reversed the conviction of a defendant who actively participated in a robbery knowing that a confederate was using a gun, and thus who might be said to have "benefitt[ed] from the use of [a gun]." Opp.

12. Nevertheless, the court reversed the conviction because of the lack of proof that she actually encouraged use of the firearm (137 F.3d at 1104) (emphasis added):

> there is no evidence that [defendant] directly facilitated or encouraged the use of the firearm during the August 12 robbery. As noted above, while she participated in planning the robbery in general, she did not counsel or encourage the use of the gun in particular. While *she participated in the robbery knowing a gun would be used, she took no action at the scene of the crime that encouraged or facilitated the use of the firearm.*

That court likewise reversed the conviction in *United States* v. *Bancalari*, 110 F.3d 1425 (9th Cir. 1997), because of a similar failure of proof, very much like the facts here (*id.* at 1430):

> [T]here is no way we can say that [defendant] consciously and intentionally assisted his accomplice in using or carrying a firearm during and in relation to the kidnapping, even though he knew at some point that his accomplice did use the firearm during the actual kidnapping. There was ample evidence that the accomplice's chasing Pittman off with a gun was part of the kidnapping crime and that the accomplice violated § 924(c), however there is no finding that [defendant] intentionally assisted or facilitated the accomplice's use or carrying of the gun in doing so. The error is not harmless because we cannot determine that the jury necessarily found this element of the crime. We therefore reverse the firearm conviction.

The Fifth Circuit also has held that "in order to be convicted of aiding and abetting the § 924(c)(1) offense (under the 'use' prong), the defendant must act with the knowledge or specific intent of advancing the 'use' of the firearm in relation to the drug trafficking offense" and "perform[] some *affirmative act* relating to the firearm." *United States* v. *Sorrells*, 145 F.3d 744, 753-754 (5th Cir. 1998) (quoting *United States* v. *Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996)) (emphasis added). In words directly relevant here, the court wrote:

> Proof simply that a defendant knew that a firearm would be carried, even accompanied by proof that he performed some act to facilitate or encourage the underlying crime in connection with which the firearm was carried, is insufficient to support a conviction for aiding and abetting the carrying of a firearm.

Ibid. (quoting *Giraldo*, 80 F.3d at 676).

There is no serious question that petitioner's conviction would be invalid under this standard. But instead of addressing these authorities, so central to the petition (see Pet. 12, 14, 15, 16, 17, 21, 23, 25) that two were cited *passim*, the government *nowhere mentions them*—understandably, because doing so would have made plain the falsity of its claim that the acknowledged "division of authority appears to be largely academic," Opp. 13.

B. The Tenth Circuit's Rule Is Wrong

The government does not dispute that the Tenth Circuit's aiding-and-abetting standard imposes "quintessential strict liability" (Pet. 23) by authorizing Sec-

tion 924(c) convictions even for defendants who did not intend for the principal to use a firearm and did nothing to facilitate or encourage it—indeed, even if they *discouraged* its use. In doing so, however, the government repeats the Tenth Circuit's fundamental mistake—confusing the underlying drug trafficking crime or crime of violence with the gun offense itself.

Its position depends on the proposition that "[w]hen a person actively participates in the underlying * * * drug trafficking offense, he facilitates the principal's completion of the *second* element of the Section 924(c) offense," Opp. 8 (emphasis added), namely, "that the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'" *ibid.* (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). The government cites no authority for the novel assertion that a defendant's active participation in (and thus facilitation of) the underlying offense somehow "bring[s] about" the use or carrying of a firearm, Opp. 8-9, regardless of his intent or actions with respect to the firearm's use. The government is also conspicuously silent about what participation in the drug offense shows about the *first* Section 924(c) element, "that the defendant use[d] or carr[ied] a firearm." Opp. 8 (internal quotation omitted).

The government recognizes this error. In its Criminal Resource Manual, which serves as guidance to all U.S. Attorneys, the government acknowledges that it must prove "that the accused had *specific intent* to facilitate the commission of a crime by another" and "that the accused had the *requisite intent* of the underlying substantive offense." U.S. Dep't of Justice, *U.S. Attorney's Manual, Title 9, Crim. Re-*

source Manual § 2474 (1997) (*Manual*) (emphasis added), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02474.htm. The *Manual* explicitly acknowledges that "a jury must find beyond a reasonable doubt that the defendant knowingly and intentionally aided and abetted the principal(s) *in each essential element of the crime*." *Ibid.* (emphasis added). Thus, outside the convenient litigating position espoused in its opposition, the government has *specifically rejected* the view that it is enough merely to intentionally facilitate *some* of the elements of a Section 924(c) offense.

The sole authority the *Manual* cites for its statement makes the government's about-face on accessory liability under § 924(c) absolutely clear: It is *United States* v. *Bancalari*—one of the cases the government neglected to address in its opposition, see p. 4, *supra*. See *Manual* § 2474 (citing *Bancalari*, 110 F.3d at 1429). There, the Ninth Circuit *expressly rejected* the government's current position, holding that "to be guilty of aiding and abetting under § 924(c), the defendant must have directly facilitated or encouraged the use of the firearm and *not simply* [*have*] *be*[*en*] *aware of its use*." 110 F.3d at 1429-1430 (emphasis added).

The government's position that simply "benefitting from the use of a gun" (Opp. 12) is sufficient to support a conviction is also impossible to square with the text of Section 2. "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite * * *. In its legal sense, it means to encourage, advise, or instigate the commission of a crime." 1 Charles E. Torcia, *Wharton's Criminal Law* § 29, at 181 (15th ed.

1993). "Aiding and abetting," then, necessarily entails affirmative action.

C. No Vehicle Problem Prevents Resolution Of This Issue

Finally, the government contends that "this case [is] not a suitable vehicle" to resolve the admitted circuit split because, it claims, petitioner's conviction for possessing empty shell cases found at the crime scene "necessarily" implies the jury concluded he possessed the firearm, Opp. 14, which, it says, "would qualify as facilitation of the use of the firearm even if petitioner was not the one who ultimately pulled the trigger," *ibid.*

In essence, the government attempts to inflate a potential alternative ground for affirmance into a vehicle problem. This Court, however, routinely reviews cases where it is uncertain if the petitioner would prevail once the erroneous legal standard is rejected. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430-1431 (2012). This is not news to the Solicitor General, who has argued time and again that uncertainty as to "the ultimate outcome" of a case "does not deny * * * a vehicle for the Court to consider important questions concerning [statutory] interpretation," and that "[t]he possibility that [respondent] might ultimately be able to [win on alternative grounds] * * * would not prevent the Court from addressing the questions presented in the petition." Cert. Reply Br. at 10, United States, *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247); *accord* Cert. Reply Br. at 8, *Astrue* v. *Capato*, 132 S. Ct. 2021 (2012) (No. 11-159).

Even taken at face value, the government's so-called "vehicle" argument falls flat. The error here was not harmless. The government has never before resorted to its strained reading of the record to justify the tripling of petitioner's sentence, and for good reason: It accords with neither the government's theory at trial nor the instructions it urged on the district court, which emphatically encouraged the jury to take an expansive view of "possession" that was readily satisfied by petitioner's already-tenuous aiding-and-abetting liability for "using or carrying" the firearm.

The district court instructed the jury that possession of a firearm is an element of a Section 924(c) violation, and that the "possession involved carrying, using, brandishing or discharging the firearm during and in relation to the drug trafficking crime." 1 C.A. App. 66. And the court explicitly instructed the jury that "[a]iding and abetting is simply another way of committing the offenses charged in those counts," *id.* at 72, making clear that aiding and abetting Section 924(c) involved "possession." It reinforced that point by emphasizing that "[p]ossession may be sole or joint," "actual [or] constructive," and that the term applied to anyone who exercised "authority, dominion, or control over" the firearm, *id.* at 83; see also *id.* at 54 (stating, with respect to drug-possession offense, "a person need not have actual physical custody of an object in order to be in legal possession of it," but is in possession if he "has the ability to exercise substantial control over an object"). It is thus unsurprising that after the judge explicitly instructed the jury that it should "find that the defendant 'carried' the firearm" (Pet. App. 29a) if it believed he "aided

and abetted" the offense, that the jury concluded he also "possessed" the ammunition inside it—"jointly with another," 1 C.A. App. 68, namely the person who actually brandished and discharged the firearm.

The government claims (Opp. 14) that "[its] only argument to the jury on [the ammunition] counts was that because the evidence established petitioner's 'possession of the 9 millimeter firearm,' it necessarily" established possession of the empty cartridge cases later found on the ground, *ibid.* But it omits portions of the prosecutor's statement that undermine its recently discovered harmless-error theory. What the prosecutor actually stated is that "the government's evidence establishing the defendant's possession of the 9 millimeter firearm is *what I've already talked to you about*." 11/16/11 Tr. 24 (emphasis added). And what was that? As it happens, it was *both* that petitioner "was the shooter," *id.* at 22, and the "alternative legal theory [that] is called aiding and abetting," so that even if "Ronald Joseph or Vashti Perez fired the gun," *id.* at 22-23, he is guilty of "using or carrying it." Thus, contrary to the government's newly minted theory that the ammunition counts of the indictment prove he was convicted of actually possessing the firearm, the far likelier scenario is that petitioner's legally flawed "aiding and abetting" conviction permitted him to be convicted of possessing ammunition because a confederate discharged a firearm.

The government ends its opposition with a half-hearted assertion that "[i]n any event, the trial evidence established beyond doubt that petitioner was the shooter." Opp. 15. The government's new expressions of confidence are difficult to square with

the statement of the government attorney who tried the case, who conceded to the trial court, "I still don't think we know what the jury – what the basis for their verdict was." Pet. App. 40a. Even that equivocal statement gave too much credence to the government's discredited theory that petitioner was the shooter. The government offers no explanation why a jury that believed petitioner himself discharged the firearm would have bothered to send out a note asking whether "aiding and abetting appl[ied] to" the verdict form question asking whether petitioner had "used," "carried," "brandished," or "discharged" a firearm. *Id.* at 29a, 40a.

* * * * *

Nearly three-quarters of petitioner's 14-year prison sentence stems from his conviction for "aiding and abetting" the use of a firearm, although the government readily concedes no jury ever found that he "gave assistance or encouragement" to its use, much less that he did so "with the intent thereby to promote or facilitate commission" of the firearm offense. Wayne R. LaFave, *Substantive Criminal Law* § 13.2 (2d ed. 2003). Petitioner is not alone. The government "routinely" charges "individuals [with] aiding and abetting in using or carrying a firearm." *Jordan*, 2008 WL 2245856, at *1. The rule applied here, and by a minority of courts of appeals, is tantamount to strict liability, appreciably increasing the likelihood that a defendant will be subject to the "severe penalties of § 924(c)," *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980), which can include imprisonment for five, ten, twenty years or for life. By visiting draconian penalties on defendants significantly less culpable than the principals they purportedly "abet," the mi-

nority runs afoul of the "basic precept of justice that punishment for crime should be graduated and proportioned" to both the offender and the offense," *Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Weems* v. *United States*, 217 U.S. 349, 367 (1910)).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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MAY 2013

JOINT APPENDIX

AUG - 2 2013
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No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX
(VOLUME 1)

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PETITION FOR CERTIORARI FILED JANUARY 16, 2013
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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari:

A. Tenth Circuit Opinion 1a

B. Judgment of Conviction 12a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL
DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case 2:07CR886
JUSTUS ROSEMOND,	)	
Defendant.	)	

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Text
1	12/05/07	SEALED INDICTMENT as to Justus Rosemond (1) count(s) 1, 2. Assigned to Judge Dale A. Kimball (jwt) (Entered: 12/06/2007)
5	01/14/10	ORDER granting Motion to Unseal Case as to Justus Rosemond (1). Signed by Judge Dale A. Kimball on 01/13/2010. (kpf) (Entered: 01/14/2010)

No.	Filed	Docket Text
9	03/02/10	Minute Entry for proceedings held before Judge Magistrate Judge Paul M. Warner Initial Appearance Arraignment / Pretrial Conference as to Justus Rosemond * * * (ksm) (Entered: 03/02/2010)
40	07/28/10	Proposed Jury Instructions by USA as to Justus Rosemond (Travis, Veda) (Entered: 07/28/2010)
41	07/28/10	Proposed Jury Verdict by USA as to Justus Rosemond (Travis, Veda) (Entered: 07/28/2010)
42	07/28/10	Proposed Jury Verdict by USA (Travis, Veda) (Entered 07/28/2010)
44	07/28/10	SUPERSEDING INDICTMENT as to Justus Rosemond (1) count(s) 1s, 2s, 3s-4s. Assigned to Judge Dale A. Kimball (jmr) (Entered: 07/28/2010)
67	11/29/10	OBJECTIONS to by Justus Rosemond *to Government's Proposed Jury Instructions* (Gregersen, Mark) (Entered: 11/29/2010)

No.	Filed	Docket Text
74	12/07/10	Proposed Jury Instructions by Justus Rosemond (Gregerson, Mark) (Entered: 12/07/2010)
76	12/07/10	Proposed Jury Instructions by USA as to Justus Rosemond (Travis, Veda) (Entered: 12/07/2010)
81	12/08/10	Proposed Jury Instructions by Justus Rosemond (Gregerson, Mark) (Entered: 12/08/2010)
82	12/08/10	OBJECTIONS to Proposed Jury Instructions by Justus Rosemond (Gregerson, Mark) (Entered: 12/08/2010)
93	12/13/10	Minute Entry for proceedings held before Judge Dale A. Kimball: Jury Trial as to Justus Rosemond *** Voir dire was completed *** Opening statements were made by Ms. Fojtik and Mr. Gregersen. Testimony of govt witnesses was heard &evidence received. The jury was excused at 2:15 PM and instructed to return at 8:30 AM on 12/14/10. *** (kmj) (Entered: 12/13/2010)

No.	Filed	Docket Text
95	12/14/10	Minute Entry for proceedings held before Judge Dale A. Kimball: Jury Trial as to Justus Rosemond * * * Testimony of witnesses was heard and evidence rec'd. Govt rested. Out of the Jury's presence, Mr. Gregerson moved for Rule 29 judgment of acquittal; the motion was denied. Dft rested. The Court set the jury instruction conference for 3:50 PM today. The jury returned to box and was excused, with instructions to return at 8:30 AM on 12/15/10. Court recessed at 1:05 PM. * * * (kmj) (Entered: 12/14/2010)
96	12/14/10	Minute Entry for proceedings held before Judge Dale A. Kimball: In Chambers Conference re: jury instructions as to Justus Rosemond held on 12/14/2010. * * * (kmj) (Entered: 12/14/2010)
97	12/15/10	Jury Instructions as to Justus Rosemond (alt) (Entered: 12/15/2010)

No.	Filed	Docket Text
98	12/15/10	Minute Entry for proceedings held before Judge Dale A. Kimball: Jury Trial as to Justus Rosemond * * * The jury returned to the box; trial resumed. Judge Kimball read the jury instructions to the jury. Closing arguments were made by Ms. Travis and Mr. Gregersen. The jury retired to deliberate at 10:54 AM. Jury note rec'd and answered. The jury returned with its verdict at 2:13 PM. The verdict was published – guilty on all counts. The jury was polled, thanked and excused. Sentencing is set for 2:30 PM on 2/24/11. Court recessed at 2:21 PM. * * * (kmj) (Entered: 12/15/2010)
100	12/15/10	JURY VERDICT as to Justus Rosemond (1), Guilty on Counts 1s, 2s, 3s-4s. (kmj) (Entered: 12/15/2010)
104	12/15/10	****SEALED DOCUMENT**** Jury Notes as to Justus Rosemond (kmj) (Entered: 12/15/2010)

No.	Filed	Docket Text
110	03/01/11	Minute Entry for proceedings held before Judge Dale A. Kimball: Sentencing held on 3/1/2011 for Justus Rosemond * * * Count(s) 1 and 2, Dismissed. Count(s) 1s, 3s, and 4s Dft was found guilty by a jury at trial. SENTENCE: Dft is committed to custody of BOP for 48 months, to run consecutively to Count 2s and concurrently to the sentence imposed in case 1:10–CR–00093 TC. Upon release, dft will be placed on Supervised Release for a term of 60 months with standard and special conditions imposed. No fine. $400 SPA. Count 2s, dft was found guilty by a jury at trial. SENTENCE: Dft is committed to custody of BOP for 120 months, to run consecutively to Counts 1s, 3s, and 4s and concurrently to the sentence imposed in case 1:10–CR–00093 TC. No fine. Court advised dft of his appeal rights. * * * (kmj) (Entered: 03/01/2011)

No.	Filed	Docket Text
111	03/02/11	JUDGMENT as to Justus Rosemond (1). Count(s) 1, 2, Dismissed; Count(s) 1s–4s, Dft was found guilty by jury. SENTENCE: Dft committed to custody of BOP for 48 months total on counts 1s, 3s and 4s, and for 120 months on count 2s, which will run consecutively to the other three counts, for a total sentence of 168 months on all four counts. Total custody time ordered in this case is to run concurrently with the sentence imposed in case 1:10cr93 TC. Upon rls, dft shall be on Supervised Release for 60 months total. FINE: None. SPA: $400.00 total – $100 per count. Defendant Termed – CASE CLOSED. Signed by Judge Dale A. Kimball on 3/2/11 (alt) (Entered: 03/03/2011)
113	3/04/11	NOTICE OF APPEAL by Justus Rosemond re Judgment[] Appeals to the USCA Tenth Circuit. No Filing Fee. (Gregersen, Mark) (Entered: 03/04/2011)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 11-4046

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROSEMOND,
Defendant – Appellant.

RELEVANT DOCKET ENTRIES

Date	Docket Entry
03/18/2011	Criminal case docketed. Preliminary record filed. DATE RECEIVED: 03/04/2011. Docketing statement due 04/01/2011 for Justus Cornelius Rosemond. Notice of appearance due on 04/01/2011 for Justus Cornelius Rosemond and United States of America. A/Pet designation of record due 4/01/2011 for Justus Cornelius Rosemond. Transcript order form due 04/01/2011 for Mark J. Gregersen.

Date	Docket Entry
03/18/2011	Docketing statement filed by Mr. Justus Cornelius Rosemond. Served on 03/18/2011. Manner of Service: ECF/NDA. MJG.
06/21/2011	Appellant/Petitioner's brief filed by Mr. Justus Cornelius Rosemond. *** Oral argument requested? Yes. RJG.
07/22/2011	Appellee/Respondent's brief filed by United States of America. 7 paper copies to be provided to the court. Served on: 07/22/2011. Manner of service: US mail, ECF/NDA. Oral argument requested? No. DB
08/22/2011	Appellant/Petitioner's reply brief filed by Mr. Justus Cornelius Rosemond. 7 paper copies to be provided to the court. Served on 08/22/2011. Manner of Service: US mail, ECF/NDA. RJG
11/15/2011	Case argued by Robert Gorence for Appellant and by Dave Backman for Appellee; Submitted to Judges Kelly, Baldock and Ebel.
09/18/2012	Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges Kelly, Baldock and Ebel.

Date	Docket Entry
09/18/2012	Judgment for opinion filed. [11-4046]
10/10/2012	Mandate issued. [11-4046]
12/06/2012	Supreme Court order extending time to file the petition for a writ of certiorari filed. [11-4046]
01/23/2013	Petition for writ of certiorari filed by Justus Cornelius Rosemond on 01/16/2013 and placed on the docket 01/22/2013 as Supreme Court Number 12-895. [11-4046]
05/28/2013	Supreme court order dated 05/28/2013 granting certiorari filed. [11-4046]

APPENDIX C

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	2:07-CR-886DAK
	:	SUPERSEDING
	:	INDICTMENT
	:	
Plaintiff,	:	VIO. 21 U.S.C. § 841(a)(1) POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE; 18 U.S.C. § 924 (c), DISCHARGING A FIREARM DURING AND IN RELATION TO DRUG TRAFFICKING; 18 U.S.C. § 922 (g), POSSESSION OF A FIREARM BY A RESTRICTED PERSON
vs.	:	
JUSTUS ROSEMOND,	:	
Defendant.	:	

The Grand Jury charges:

COUNT I

On or about August 26, 2007, in the Central

Division of the District of Utah,

JUSTUS ROSEMOND,

defendant herein, did knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance within the meaning of 21 U.S.C. § 812, and did aid and abet therein; in violation of 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 2, and punishable under 21 U.S.C. § 841 (b) (1) (D).

COUNT II

On or about August 26, 2007, in the Central Division of the District of Utah,

JUSTUS ROSEMOND,

defendant herein, during and in relation to the drug trafficking offense set forth in Count I, did knowingly use, carry, brandish and discharge a firearm, to wit a 9mm handgun, and did aid and abet therein; in violation of 18 U.S.C. § 924 (c) (1) (A) and 18 U.S.C. § 2.

COUNT III

On or about August 16, 2007, in the Central Division of the District of Utah,

JUSTUS ROSEMOND,

defendant herein, having been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess ammunition in an affecting commerce, to wit, 9mm Winchester-Western shell casings, in violation of 18 U.S.C. § 922 (g) (1) and punishable under 18. U.S.C. § 924 (a) (2).

COUNT IV

On or about August 26, 2007, in the Central Division of the District of Utah,

JUSTUS ROSEMOND,

Defendant herein, being an alien illegally and unlawfully in the United States, did knowingly possess ammunition in the affecting commerce, to wit, 9mm Winchester-Western shell casings, in violation of 18 U.S.C. § 922 (g) (5) (A) and punishable under 18 U.S.C. § 924 (a) (2).

A TRUE BILL:

/s/

FOREPERSON OF THE GRAND JURY

CARLIE CHRISTENSEN
ACTING UNITED STATES ATTORNEY

/s/ Veda M. Travis

VEDA M. TRAVIS
Assistant United States Attorney

APPENDIX D

DEFENDANT ROSEMOND'S REQUESTED JURY INSTRUCTION NO. __

The defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant intentionally took some action to facilitate or encourage the use of the firearm.

See, United States v. Daniels, 370 F.3d 689, 691 (7th Cir.2004) ("The defendant must [1] know, either before or during the crime, that the principal will possess or use a firearm, and then [2] after acquiring knowledge intentionally facilitate the weapon's possession or use."): United. States v. Rodriguez-Lozada, 558 F.3d 29, 42 (1st Cir. 2009) ("To sustain a conviction for aiding and abetting a violation of § 924(c)(1), the evidence must be sufficient to show both that the defendant knew, to a practical certainty, that the principal would possess a gun in furtherance of the drug crime and that the defendant facilitated that possession."); United. States v. Medina, 32 F.3d 40, 45 (2nd Cir. 1994) ("[One] cannot be convicted as an aider and abettor under Sec. 924(c) merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the robbery itself. Rather, the language of the statute requires proof that he performed some act that directly facilitated or encouraged the use or carrying of a firearm."); United States v. Bancalari 110 F.3d 1425, 1429 (9th Cir. 1997) ("[I]n order to be

convicted of aiding and abetting his accomplice's § 924(c) violation, [one] must have knowingly and intentionally aided and abetted the use or carrying of the firearm during and in relation to the crime ..."); Bazemore v. United States, 138 F.3d 947, 949 (11th Cir. 1998) ("In addition to knowledge, in order to sustain a conviction under an aiding and abetting theory, there must be some proof 'linking' the defendant to the gun, because section 924(c) does not permit 'guilt by association.").

Cf., United States v. Bowen, 527 F.3d 1065, 1079 (10th Cir. 2008); and United States v. Vallejos, 421 F.3d 1119, 1125 (10th Cir. 2005) (holding that if the 18 U.S.C. section 924(c) violation was related to an underlying crime of violence, then aiding and abetting does not require that defendant intentionally take some action to facilitate or encourage use of the firearm). Here, defendant Rosemond is charged with 924(c) as to drug trafficking.

APPENDIX E

GOVERNMENT'S REQUESTED SUPPLEMENTAL JURY INSTRUCTION NO.___

The Superseding Indictment also charges the defendant with aiding and abetting the crime of using, carrying, brandishing or discharging a firearm during the drug trafficking crime. Under that statute, you may also find the defendant guilty of violating 18 U.S.C. § 924(c) if you find the defendant aided and abetted another in the commission of that crime. To find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find:

First: the defendant knew his cohort used a firearm in the drug trafficking crime, and

Second: the defendant knowingly and actively participated in the drug trafficking crime.

United States v. Bowen, 527 F.3d 1065, 1078 (10th Cir. 2008)

United States v. Vallejos, 421 F.3d 1119, 1125 (10th Cir. 2005)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	Case No. 2:07-CR-886 DAK
Plaintiff,	)	DEFENDANT ROSEMOND'S OBJECTION TO GOVERNMENT'S REQUEST FOR JURY INSTRUCTION (DOC. 76)
vs.	)	
JUSTUS ROSEMOND,	)	
Defendant.	)	

Defendant Justus Rosemond through his attorney Mark J. Gregersen, hereby objects to the jury instruction requested by the government on December 7, 2010, in docket entry 76.

The proposed instruction states that to find the defendant guilty of violating 18 U.S.C. § 924(c), with an underlying drug trafficking crime, the jury must find: first, that the defendant knew his cohort used a firearm in the drug trafficking crime, and second, the defendant knowingly and actively participated in the drug trafficking crime. Defendant asserts that the second prong of this test is incorrect. The cases cited by the government, United States v. Bowen, 527 F.3d

1065, 1078 (10th Cir. 2008), and United States v. Vallegos, 421 F.3d 1119, 1125 (10th Cir. 2005), state that this is the test when the 924(c) violation has an underlying crime of violence. Here, the underlying crime is alleged as drug trafficking. See also the cases cited by defendant in document 74, explaining the standard applicable when the crime underlying the 924(c) violation is drug trafficking.

Respectfully submitted this 8th day of December 2010.

/s/ Mark J. Gregersen
MARK J. GREGERSEN
Attorney for Defendant Rosemond

Mark J. Gregersen, #6553
10 W. Broadway, Suite 505
Salt Lake City, UT 84101
801-747-2222
Attorney for Defendant Rosemond

APPENDIX G

[Trial Transcript – December 13, 2010]

[Opening Statements]

* * *

[3] **P R O C E E D I N G S**

(In open court in the presence of the jury.)

THE COURT: Ms. Fojtik, you may make the opening statement for the United States.

MS. FOJTIK: May it please the Court, Counsel, Ladies and Gentlemen of the jury.

On August 26th, 2007, two young girls were at Eldin [sic] Park in Tooele. Chelsie Turner goes by Chelsie Turner Lopez now and Kala Hamilton. They were doing what young teenage girls do on Sunday night, they were chatting on the phone.

One of them, Chelsie, was talking to her boyfriend. They were sitting in the playground area of a Tooele park. While they were sitting there, they observed some individuals come walking into the park. You are going to hear a description; you are going to see a map of Eldin Park in Tooele. It's a neighborhood park, like many others. It's got a tennis court and baseball fields and a couple of playgrounds.

Chelsie Turner and Kala Hamilton were at one of the playgrounds. They observed two individuals come walking from the other side of the park. Around the same they saw a car pull into a parking lot at Eldin Park.

They watched these two from their perch over at the slide in the playground and they saw the car and individuals who had been walking have some kind of intersection. Almost [4] immediately thereafter, after these – the person on foot, the individuals on foot and the individuals in the car intersected, they heard shots rang out.

They heard several shots fired in the park at that point in time. That's what the started this case. This case is about who did that shooting and what caused that shooting in Eldin Park on that August 26th of 2007.

Chelsie Turner, while they were on that slide, they heard the shots ring out and immediately ducked down.

Luckily, there was a little protection on the slide, and they called 911. And that led to several Tooele police officers arriving almost immediately at Eldin park. Tooele is not a very big town, they got there very quickly.

Officer Chris Thompson arrived at the scene and the girls told him, they described the vehicle. They had said it was a small vehicle, small dark vehicle, and a call went out on dispatch to 911, "There is a small vehicle with three individuals that were involved in a shooting."

Chelsie and Kala will tell you the car fled the park very quickly, very quickly, almost immediately after the shooting.

Officer Thompson was on the scene. He speaks to the two girls, and in the vicinity where the car had been parked, he observes there's seven shell casings, spent shell casings in the parking lot at that point in

time. He recovers those [5] shell casings and he also notices in the parking lot a pair of white tennis shoes that are in that parking lot as well. He recovers those at that point in time.

Other officers have started to arrive. You are going to hear from Officer Jerry Hansen. He too responded to the scene at Eldin Park.

And he can tell you he recovered a black baseball hat, again, in a different area of Eldin Park.

The officers shortly thereafter spoke to some of the neighbors in the area. And you are going to hear from Darrell Waters and Terry Morrill, they lived right in the vicinity of Eldin Park, and they are going to tell you they heard shots across the street from them in that park that evening around the same time.

Now, I mentioned earlier, a call had gone out over the dispatch that there was a car that was involved in a shooting in Eldin, and very shortly after that call went out, Utah Highway Patrol Trooper, Nathan Croft, observed a small blue sedan proceeding in front of him about two blocks from Eldin Park in Tooele, and he noticed the vehicle was are proceeding in a pretty quick pace.

He signaled, he pulled the vehicle over, and he observed that there were three individuals in this vehicle. It was a 1996, it was a Mazda Protege, it was the car, he was about two blocks from Eldin Park when he pulled this vehicle [6] over.

As he approached the car, Trooper Croft will tell you he parked behind the small vehicle, and he waited for a moment for backup, since it was a car alleged to be involved in a shooting, he took a

moment and waited for backup.

But then as he was waiting for backup, he could observe through the back window the individuals in this car. He saw the driver, someone in the front seat passenger's side, and someone behind the driver.

But what he also noticed was the individual in the front seat passenger side was moving around, he was moving around very actively, kind of suspicious manner. He saw the driver and he saw the person behind the driver just sitting there quietly until he approached the vehicle.

Trooper Croft had had backup coming and you're going to hear from Officer Becky Bracken. She came and backed him up.

They approached the individuals in the car. They identified the individuals within the car. The driver was a woman named Vashti Perez. The passenger was the Defendant in this case, Justice Rosemond. He is sitting in that passenger seat. The individual behind the driver is a gentleman named Ronald Joseph. And the registered owner of that vehicle was Vashti Perez, the driver.

Trooper Croft is going to tell you he conducted a [7] cursory search of the vehicle and at that point they didn't recover a weapon. But importantly, they got all of the identifying information from Ms. Perez, from the Defendant, from the individual in the back seat, and that led to further investigation with the Tooele Police Department.

After that stop, officers went back and began trying to put together whether or not this vehicle was connected with to that shooting at Eldin Park.

They went back and they interviewed Vashti

Perez, and you are going to hear Ms. Perez testify. And she is going to acknowledge that on August 26th, 2007, she had been the middleman in a drug, and that drug deal was involving the Defendant Justice Rosemond and two individuals that were acquaintances of hers that she knew as Ricardo and Kobe.

Justice Rosemond was going to be the seller, Ricardo and Kobe were going to be the buyers in that deal.

You are going to hear testimony from Kobe Painter. He is going to acknowledge he went to Eldin Park that night, August 26th, 2007, and he was going to participate in a drug deal to buy some marijuana. He is going to say that Vashti had arranged that deal, and they arrived at the park that night and he went there with his friend, Ricardo Gonzales.

He's also expected that Kobe is going to tell you that at some point during the intersection of the individuals that came on foot, Vashti and Justice and Ricardo were in the [8] car, Kobe is going to tell you that he saw Ricardo get in the car and punch the individual that was going to sell him marijuana, grab the marijuana, and the two of them took off at a high rate of speed.

They robbed the individuals that they were going to be purchasing the drugs. It is expected that that's what Robe is going to tell you.

What he is also going to tell you is immediately, almost immediately after those drugs were taken, they heard gunshots go off.

Kobe is going to tell you he ran so fast from that site, he left his tennis shoes in the parking lot, and

those are the shoes found that Officer Thompson recovered.

You are also going to hear from Ricardo Gonzales. It's expected he is going to tell you he arranged with his friend Vashti to buy marijuana that evening, it is arranged for Eldin Park at that time where everyone met, and he is also going to acknowledge that he made a decision to rob the dealer.

Ricardo is going to acknowledge he punched that individual and he fled, he grabbed the marijuana and fled. And he is going to describe as he fled the park, he lost his black baseball cap, that that's what Officer Hansen is going to describe that he had found.

You are also going to hear from Ronald Joseph, the [9] individual in the backseat of the car. Ronald Joseph is going to indicate that Justice Rosemond was doing this marijuana deal with Ricardo, and Ronald Joseph will put the gun in Justice Rosemond's hands just has Trooper Croft is pulling them over and signaling them to stop at that point in time.

Now, not surprisingly, this is a case about drug dealing. Our witnesses are not angels. They are individuals involved in drug trafficking, and you are going to hear their testimony and make evaluations of their credibility.

The crimes charged in this case are straightforward, and as Judge Kimball has indicated earlier, possession of marijuana with intent to distribute it, possession of a firearm in relation to that marijuana deal, possession of an individual who is a felon, and possession by any individual who is an illegal alien.

Last, we'll hear, it is undisputed, that at the time

of these charges in 2007, Justice Rosemond was both a convicted felon and an illegal alien.

It is the government's burden to prove this matter beyond a reasonable doubt, and we welcome that burden. We think the evidence will establish beyond a reasonable doubt that Justice Rosemond was the individual who let off that round of shots in Eldin Park on that night.

Ms. Travis and I are very mindful that to do our jot it requires taking time out of your busy lives, particularly [10] at a very busy time of year to begin with.

We are going to do everything we can to make sure this matter moves along as efficiently as possible.

Thank you in advance for your time and your consideration of this matter.

THE COURT: Thank you, Ms. Fojtik.

Mr. Gregersen, you may make your opening statement.

MR. GREGERSEN: May it please the Court, and, Counsel, and members of the jury. Again, thank you for your time, as the prosecutor indicated, and your willingness for serve on the jury.

Once again, I represent the Defendant, seated here, who grew up in Texas, has a wife and children there, and five children, and also was born in the same place out of Florida I think of the Caribbean or Caribbean area.

The government has correctly identified what the question is for you to decide and that is whether Mr. Rosemond was the person who fired shots. That as

you listen to each of the witnesses, that is the question, is whether the — whether the witness is believable and whether the witnesses establish in your mind that it was Justice Rosemond that fired those shots.

And this case is a bit like a Clue game. On the one hand, it really isn't a game. Somebody committed a crime that is serious because shots were fired, even though no person was [11] hit by the shots. But it is my understanding of the evidence and of the case that I anticipate the governmental show, that it will show that indeed there was, just as in a Clue game, there was a crime that was at the park, and the crime was with a gun. And the question will be whether the crime was by Justice Rosemond shooting the gun.

Thank you.

THE COURT: Thank you, Mr. Gregersen.

* * *

APPENDIX H

[Trial Transcript – December 13, 2010]

[5] **CHELSIE LOPEZ**

* * *

THE CLERK: * * * Please state your name and spell it for the record.

THE WITNESS: Chelsie, C-H-E-L-S-I-E, Lopez, L-O-P-E-Z.

THE CLERK: Thank you.

* * *

[6] **DIRECT EXAMINATION**

BY MS. FOJTIK:

* * *

[7] Q. Okay? Going back then, on August 26th, 2007, how old were you? [8]

A. Seventeen.

Q. What were you doing in the park that evening?

A. Just talking with my cousin.

Q. Okay. Were you on the phone with your boyfriend, too?

A. Yes.

Q. Okay. Had you guys been drinking or using anything illegal at that point?

A. No.

Q. Do you remember what time of evening, roughly, you were there from?

A. I don't remember exactly. It was dark outside so it was late in the night.

Q. Okay. And when you first arrived at the park with Kala, did you both arrive together or did you meet there?

A. We met there, yeah.

Q. Okay. And was anybody else in the park that night when you guys got there?

A. Not what we noticed, no.

Q. Okay. And tell me about the lighting in the park. Is there lighting in Elton park?

A. Yes.

* * *

[10] Q. Okay. What do you remember about the car that came into the parking lot?

A. It just – it came but it just sat there like anybody else would come to the park.

Q. Okay. Can you describe the car at all? What do you remember about the description of the car?

A. It was a dark vehicle, possibly four doors.

Q. Okay. Do you remember what color you indicated it was at the time?

A. Dark blue or black.

Q. Okay. Did you see – you mentioned two individuals came walking across the park. Did you see how they got to the park?

A. I only seen one.

Q. Okay. You only saw one?

A. I only seen one.

Q. And did you – did you see how that individual

got to the park? [11]

A. No. I just seen them walk across the grass.

Q. Okay. They walked across the grass, then what did they do, the individual on foot?

A. They walked to the car, to the front side of the car.

Q. Did they actually appear to talk to anyone in the car?

A. Yes, there was somebody standing.

Q. There was – say that again?

A. There was somebody standing outside of the vehicle when they got there.

Q. Okay. How long were they at the vehicle?

A. I would say any more than five to ten minutes.

Q. Okay. What happened after – let me go back. Did you hear anything that was being said at that point in time?

A. No, you couldn't hear any voices.

Q. And let me ask you a Q. Show on the map where you and Kala were when this was going on.

A. We were here.

Q. And what's there?

A. There's a playground.

Q. Okay. And specifically where on the playground?

A. At the very top.

Q. At the very top. Were you – had you climbed up stairs or –

A. Yes, you had to climb up two flights of stairs.

Q. Okay. And was that at the top of the slide? [12]

A. Yes.

Q. Okay. So how could you see past the bathroom, if that's in your way?

A. Because when you're at the top, you have visual to the – to the – that side of the park over to—clear to Broadway.

Q. Okay.

A. You have visual of the whole park from up there.

Q. Okay. So you and Kala were there. You saw the individuals – taking you back for a minute – approach the vehicle that was there, then what happened?

A. And then we heard gunshots and we looked up and the – there was somebody running back down toward Broadway.

Q. An that's back down toward – do you remember which way they headed towards Broadway?

A. Like diagonal.

Q. So diagonally towards the corner of Broadway?

A. Yes.

Q. Okay. Do you remember how many shots you heard?

A. I would say about five or six.

Q. Okay. And did you see where the shots were coming from?

A. It was coming from where the vehicle was

parked in front.

Q. Okay. And were you able to see where the shooter came from?

A. The shooter, I—I'm not sure where they came from but they got back in the same vehicle. [13]

Q. Okay. Do you recall if the shooter came from within the vehicle?

A. Yes.

Q. Okay. Do you remember – could you identify if the shooter came from the front seat or the back seat:

A. No.

Q. Okay. And you indicated you saw people get back in the car. Do you recall how many people you saw get back into the car?

A. No, at that time it was just kind of quick glance up and back down because there was – there was a shooting so it was just like a quick glance because the shooting had stopped.

Q. Okay. Did you speak to the police about this?

A. Yes.

Q. And what did you do when you spoke to the police about it?

A. They just basically asked what happened and what we had seen, how many people, stuff like that, just basically what we were there for.

Q. And they did that on the scene at that point in time?

A. Yes.

Q. And did you guys also call 911?

A. Yes.

MS. FOJTIK: If I could just have a moment.

THE COURT: You may. [14]

MS. FOJTIK:

Q. Ms. Travis just reminded me. I forgot to ask you. What is Kala's last name?

A. Hamilton.

MS. FOJTIK: Okay. I have no further questions of this witness.

THE COURT: Thank you, Ms. Fojtik. Ms. Gregersen, you may cross-examine.

CROSS-EXAMINATION

BY MR. GREGERSON:

Q. Ms. Lopez, did you, in fact, see that it was someone from the vehicle that fired the shots:

A. Yes.

Q. And you indicated that you spoke with officers, correct?

A. Yes.

Q. and do you remember speaking with an Officer Thompson?

A. I don't remember an officer's name exactly.

Q. Let me read from his report what he has said that you and your friend told him—

A. Okay.

Q. —to see if this is correct.

MS. FOJTIK: Your Honor, we'd object. That's not her statement, she covered the statement.

THE COURT: It's not her statement. What is it

you want to ask her?

MR. GREGERSEN: I was going to ask her what's [15] written in the report and – maybe I should just go ahead and ask it.

THE COURT: Would you ask the question?

MR. GREGERSEN: That she said certain things.

THE COURT: Yeah. Yeah.

MR. GREGERSEN:

Q. Did you tell the officer that you were seated near the pavilion just east of the restrooms?

A. Yes.

Q. Did you say that you saw a gold or tan-colored SUV?

A. No.

Q. Did you say that you saw another vehicle that was parked on Broadway for a while?

A. No.

Q. Did you say that a blue car pulled into the parking lot near the restrooms?

A. Yes.

Q. Did you say that two or three subjects walked form the area of the other car past the tennis courts?

A. No.

Q. Did you say that persons came from another vehicle and then climbed into a blue car in the parking lot?

A. No.

Q. And I take it, then you did not say that the persons were in that car for a few minutes?

A. No. [16]

Q. Did you tell the officers that you saw several people jump out of the car?

A. No.

Q. And did you tell the officer that you saw them start to run in different directions?

A. I only seen one person run.

Q. Did you tell the officer that one male subject got out of the car on the driver's side and started shooting?

A. No.

Q. Did you tell the officer that you saw subjects jump back into the blue car and take off?

A. I only seen one.

* * *

APPENDIX I

[Trial Transcript – December 13, 2010]

[17] **KALA HAMILTON**

* * *

THE CLERK: Thank you. Please take the witness stand right over there. Please state your name and spell it for the purpose the record.

THE WITNESS: Kala Hamilton, K-A-L-A H-A-M-I-L-T-O-N. [18]

THE COURT: You may proceed.

EXAMINATION DIRECT

BY MS. FOJTIK;

Q. Ms. Hamilton, what were you doing on the evening of August 26th, 2007?

A. Hanging out with my cousin at the park.

THE COURT: You need to speak up and right into the mic.

THE WITNESS: Okay.

MS. FOJTIK:

Q. Which park were you at?

A. Elton Park.

Q. And do you live in the vicinity of Elton Park?

A. Yes.

Q. And who is your cousin, just so we know?

A. Chelsie Turner.

Q. Okay. How old were you in August 2007?

A. Fifteen.

Q. And what were you doing in the park with your cousin?

A. Hanging out with her.

Q. Okay. Had you been in Elton Park before?

A. Yes.

Q. At this point I'm going to show you what's previously been marked as Government's Exhibit No. 7. Can you take a look at that picture that's right in front of you? [19]

MS. FOJTIK: If I may approach, Your Honor?

THE COURT: You may.

MS. FOJTIK:

Q. Are you familiar with that picture?

A. Yes.

MS FOJTIK: If I can correct the record. It's Government's Exhibit No. 1.

MS. FOJTIK:

Q. Are you familiar with that exhibit?

A. Yes.

Q. Okay. And what is it?

A. It's Elton Park.

MS. FOJTIK: If we could publish that to the jury at this point in time.

(Exhibit was published to the jury.)

MS. FOJTIK:

Q.Now, in front of you there's a little pen, has a

little silver button on it. That's a laser pointer. Could you point to the, on the map, where you and Chelsie were that night?

A. Right there.

Q. Okay. And what is that? What's in that area?

A. It's a playground.

Q. Okay. And did you stay on the playground area the whole time or had you moved around the park?

A. I moved around the park.

Q. Where did you walk around to?

A. We were by the bathrooms that are right there. I was, my [20] cousin was on the playground.

Q. So just – I want to be sure the jury heard. You were on – you went from the bathrooms to the playground at some point in time?

A. Yes.

Q. Okay. When you were at the park, you were there for how long before anyone else arrived?

A. Oh, probably about 30 minutes to an hour.

Q. Okay. Did someone arrive at the park?

A. Yes.

Q. And what did you see?

A. I seen two people walking from the tennis courts going to a car by the bathrooms.

Q. Can you use the laser pointer to show on the map where they were?

A. It was – I was – I was right here and I walked to the playground and it was right there.

Q. Okay. Let the record reflect she indicated she walked from the bathroom to the playground. Now, you mentioned two individuals, where did they walk from?

A. The tennis court that was right – right there. They were coming from there.

Q. Okay. You saw two individuals walk by the tennis courts.

A. Yes.

Q. Okay. Who else did you see coming to the park that [21] evening?

A. I seen a car pull up.

Q. Which came first, the individuals on foot or the car?

A. I just remember the people walking up to the car.

Q. Okay. So the car was already there when they got there?

A. Yeah.

Q. Okay. What do you remember about the car pulling up, do you remember anything about the description of the car?

A. No.

Q. Do you remember anything about the color of the car?

A. Nope.

Q. What was the lighting in the park at that point in time?

A. It was dark but they had the tennis lights – lights on.

Q. Okay. When you saw the people approach on foot, what did you think was going to happen?

A. I didn't think anything was going to happen but I felt uncomfortable so I walked to where my cousin was.

Q. Okay. And where in the playground were you and your cousin?

A. We were sitting on top of the slide?

Q. Okay. So from the top of the slide could you see into the parking lot by the tennis courts?

A. Yes.

Q. After you saw – did the individuals on foot approach the individuals in the car? [22]

A. Yes.

Q. And what happened?

A. They got into the car and I was walking to the playground and I looked up when they got up on to the playground and I seen a guy getting out shooting.

Q. A guy getting out of where?

A. The driver's side of the car and I seen two guys running.

Q. Okay. Did you see where the guys on foot headed?

A. One ran this way and the other ran that way.

Q. Okay. Let the record reflect one ran across the front side of the tennis courts towards Broadway. One ran toward the other side of the tennis courts toward Birch Street. And that's where the two guys on foot were headed.

Did you see anyone else go running at that

point in time?

A. No.

Q. How quickly – how quickly after the shots did you see people running?

A. I don't remember. I don't –

Q. Do you recall how many shots you heard?

A. Probably five, six.

Q. Okay. And you said you saw an individual get out of the driver's side of the car. Did you see anybody else get out of the car?

A. No.

Q. At that point in time when the shots went off, what did [23] you do?

A. I ducked down and told my cousin to call the cops.

Q. When you ducked down was there something blocking your view when you ducked down?

A. Yes.

Q. What was it?

A. The slide?

Q. So you couldn't see what was going on in the parking lot at that point?

A. Huh-uh.

* * *

[24] **CROSS-EXAMINATION**

* * *

[25] MR. GREGERSEN: Q Do you remember speaking with an officer after this event?

A. I remember, yes, but I don't remember what

we talked about.

Q. Do you remember talking with an Officer Thompson?

A. No.

Q. Let me ask you whether you said the following things to him. Did you state that you had been sitting near the pavilion just east of the restrooms?

A. Yes.

Q. And did you state that there was a fold or tan-colored SUV parked on Broadway for a while?

A. I don't remember that.

Q. Do you remember that you did not tell an officer that?

A. I don't know.

Q. Did you tell the officer that then a blue car pulled into [26] the parking lot near the restrooms?

A. Yes.

Q. Did you tell the officer that two or three subjects walked from the area of the SUV past the tennis courts and got into the car in the parking lot?

A. Yes.

Q. Did you tell the officer that they were in the car for a few minutes?

A. Yes.

Q. Did you tell the officer that they stated—well, did you tell the officer that several people jumped out of the car and started running different directions?

A. Yes.

Q. Did you tell the officer that there was one male subject who got out of the car on the driver's side and

who started shooting after the subjects?

A. Yes.

Q. Did you tell the officer that you heard seven to nine shots?

A. Yes.

Q. Did you tell the officer that the subject jumped back into the blue car and took off at a high rate of speed?

A. Yes.

* * *

APPENDIX J

[Trial Transcript – December 13, 2010]

[27] **CHRIS THOMPSON**

* * *

[28] THE CLERK: Thank you. Please take the witness stand. Please state your name and spell it for the record.

THE WITNESS: Chris Thompson, C-H-R-I-S T-H-O-M-P-S-O-N.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. TRAVIS:

Q. Mr. Thompson, where are you employed?

A. Tooele City Police Department.

Q. And in what capacity?

A. I'm an investigator.

Q. How long have you been with the Tooele Police Department:

A. Just shy of six years.

Q. And how long have you been in your current assignment as an investigator?

A. About six months.

Q. Prior to that time what were you doing?

A. Patrol officer.

Q. Now, turning your attention to August 26th of 2007, were you on duty at approximately 8:55 p.m.

that evening?

A. Yes, I was.

Q. What assignment were you working that evening? [29]

A. Patrol shift.

Q. And you were in uniform driving a marked car, is that what you mean by patrol?

A. Yes.

Q. And at approximately 8:55 p.m., was there a call that came over the radio from your dispatcher?

A. Yes, there was.

Q. Can you tell the jury what the dispatcher said?

A. That there was a shots-fired call at Elton Park, which is a park in Tooele City.

Q. And is Elton Park in a residential area?

A. Yes, it is.

Q. Did the dispatcher give as she – was it a female dispatcher?

A. I believe so.

Q. And as this was coming out over the radio, did the dispatcher give any information regarding a possible suspect or a possible suspect vehicle in connection with the shots fired

MR GREGERSEN: Objection. Calls for heresay.

MS. TRAVIS: Your Honor, this is a dispatch.

THE COURT: Overruled.

THE WITNESS: The information was given that a blue passenger car had left the park with possibly three occupants.

* * *

[31] Q. And upon your arrival, did you speak with anyone – anyone there at the park?

A. There were two female subjects at the park.

Q. Do you recall their names?

A. Chelsie Turner – Turney and Kala Hamilton.

Q. And had either one of those reported this incident to police, to your knowledge?

A. I believe it was Kala that had reported it.

Q. She had called?

A. Yeah, called dispatch.

Q. Did you interview those two women? [32]

A. Yes, I did.

Q. and did you take written statements from both of them?

A. Yes.

Q. Now, once you were done with those interviews, what did you do?

A. I just began searching the area of the parking lot looking for any evidence.

Q. And what, if anything, did you locate?

A. I started to locate some shell casings from them.

Q. Now, for any of the jurors whom may not be familiar with guns, can you tell them what a shell casing is?

A. It's brass or steel that holds in the gunpowder and primer and the projectile, the bullet, that is discharged when the gun's fired, if it's a

semiautomatic weapon.

Q. So is that piece of brass?

A. Yes.

Q. And why would – you said that you located shell casings. Why would a shell casing be on the ground or wherever it is that you might have found it?

A. If it's a semiautomatic weapon, when the round's fired, it's discharged from the gun.

Q. Okay. So, essentially, ejected out of the gun?

A. Yes.

Q. So, again, I'd like you to use the pointer and show the jury where those shell casings were located? [33]

A. In that area right there.

Q. Will you describe what that area is for the record?

A. It's the parking lot just west of the bathroom stalls. There's a little slope hill right there.

Q. And that's to the north part of the parking lot –

A. Yes.

Q. —to the west of the bathroom?

A. Yes.

Q. Were those shell casings located in the same area where the two witnesses, Chelsie Turney and Kala Hamilton, had told you that a car had been parked?

A. Yes.

Q. Did you touch or move the shell casings at any time?

A. No, I did not.

Q. What did you do – what, if anything, did you do in connection with those casings?

A. I used some spray paint to mark where the shell casings were so the area that they were at was easily identifiable.

Q. So you were trying to show where they were at?

A. Yes.

Q. Was this a calm night or was there any wind?

A. It was fairly windy.

Q. Did you have any concern that they might move in the wind?

A. Yes. [34]

Q. And is that another reason for your marking them?

A. Yes.

* * *

[39] **CROSS-EXAMINATION**

BY MR. GREGERSEN:

Q. So Detective Thompson, you did not do anything to test for fingerprints on those shells, correct?

A. No, I did not.

Q. And, to your knowledge, were steps taken by any – any other officers to test for prints on those shells?

A. Not to my knowledge.

* * *

[40] MR. GREGERSEN:

Q. Is it correct that they, meaning Ms. Hamilton and Ms. Turney, stated that they were seated – or, excuse me, sitting near the pavilion just east of the restrooms?

A. Yes.

Q. And is it correct that they stated that there was a gold and tan-colored SUV parked on Broadway for a while?

A. Yes.

Q. Did they tell you that then the blue car pulled into the [41] parking near the restrooms?

A. I believe so.

Q. Did they tell you that two or three subjects walked from the area of the SUB, past the tennis courts and got into the car in the parking lot?

A. Yes.

Q. Did they tell you that they were in the car for a few minutes?

A. Yes.

Q. Did they explain to you that they – several people jumped out of the car and started to run in different directions?

A. Yes.

Q. Did they tell you that there was one male subject who got out of the car on the driver's side who started shooting after the subjects running?

A. I believe so, yes.

Q. There stated they heard seven to nine shots?

A. Yes.

Q. The subject jumped back into the blue car and took off at a high rate of speed and headed west on 400 North?

A. Eventually that's where it ended up, yes.

Q. And does that accurately reflect what these two ladies told you?

A. Yes, I believe so.

* * *

APPENDIX K

[Trial Transcript – December 13, 2010]

[42] **BECKY BRACKEN**

* * *

[43] THE CLERK: * * * Please state your name and spell it for the record.

THE WITNESS: Becky Bracken, B-E-C-K-Y B-R-A-C-K-E-N.

DIRECT EXAMINATION

BY MS. TRAVIS:

Q. Ms. Bracken, were you at one time a police officer with the Tooele City Police Department?

A. Yes, I was.

Q. And what years did you serve in that capacity?

A. 1989 to 2009.

Q. And turning your attention to August 26th of 2007, were you on duty that day at approximately 8:55 p.m.?

A. I was.

Q. And what assignment were you working on that day?

A. Patrol.

Q. Do you recall where you were at approximately 8:55 p.m.?

A. I was in my office in the police department.

Q. And while you were there, did you receive

information that the police department had received a call of shots fired at Elton Park?

A. I did.

Q. And what did you do when you became aware of that call?

A. I started to leave the station to respond to that [44] location.

* * *

[51] MR. GREGERSEN:

Q. This is a photo that was taken at the stop, correct?

A. Correct.

Q. And it was taken by a police vehicle by a video camera; is that correct?

A. Correct.

Q. And it has an officer in a brown shirt that's a highway patrol trooper, correct? [52]

A. Correct.

Q. And do you recognize who that is in the photo in the brown shirt:

A. The officer?

Q. Yes, Do you recognize it as Officer Nathan Croft?

A. Yes, I do.

Q. Okay. And there's a gentleman next to him that's in a blue jersey. Do you recognize just – well, first of all, do you see who I'm speaking about in that photo?

A. I do.

Q. And it has a number 18 on the blue jersey, correct?

A. Correct.

Q. And do you recall if that is a picture of an individual that had been seated in the vehicle?

A. Correct.

Q. And do you recall where that individual had been seated?

A. I believe that was – I don't recall for sure, so I would hate to say.

Q. While you were there you searched the car, correct?

A. Correct.

Q. And as a police officer you received training in how to search things, correct?

A. Correct.

Q. And you were on the force from 1989 until – was it '07?

A. '09. [53]

Q. '09. Thank you. And there would be occasions when you would search entire houses, correct?

A. Correct.

Q. And on this occasion you were searching a car, correct?

A. Correct.

Q. And it was you and you also had the assistance of another officer, correct?

A. Correct.

Q. And did you follow your training and

experience in searching the vehicle?

A. I did.

Q. Did you do a thorough search of the vehicle?

A. I thought I did.

Q. Well, in your report, in fact, you indicated that you did perform a thorough search, correct?

A. Right. Yes.

Q. And did you look for a gun?

A. I did.

Q. Did you find one?

A. I did not.

Q. Did you look for ammunition?

A. I did.

Q. Did you find any?

A. I did not.

Q. Did you notice any injury to the face or nose area of any [54] of the occupants of the vehicle?

A. I did not.

* * *

APPENDIX L

[Trial Transcript – December 13, 2010]

[87] **JAMES MAY**

* * *

THE CLERK: Thank you. Please take the witness stand. Please state your name and spell it for the record.

THE WITNESS: James May. J-A-M-E-S, M-A-Y.

* * *

[103] **CROSS-EXAMINATION**

BY MR. GREGERSEN:

Q. Detective, you've mentioned the names – you mentioned the name of Ricardo Gonzales.

A. Yes.

Q. And he is a person that at one point you accused of being the shooter, correct?

A. Of what we – we're not sure who the shooter was. He was listed as a possible suspect, yes.

* * *

APPENDIX M

[Trial Transcript – December 13, 2010]

[105] **NATHAN CROFT**

* * *

[106] THE CLERK: Thank you. Please take the witness stand. Please state your name and spell it for the record.

THE WITNESS: Nathan Aaron Croft, N-A-T-H-A-N, A-A-R-O-N, C-R-O-F-T.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. FOJTIK:

Q. Trooper Croft, what was your assignment on August 26th, 2007?

A. I was a corporal assigned to patrol with the Utah Highway Patrol in Tooele County.

Q. And how long have you been working for Utah Highway Patrol?

A. A little over 11 years.

Q. And what is your current assignment for the highway patrol?

A. It's sergeant in Wendover.

Q. On August 27th – on August 26th, 2007 where were you in patrol?

A. I was in Tooele. [107]

Q. Okay. And I'm going to direct your attention to about 8:55 that evening. Where were you at that point in time?

A. I was heading southbound on Main Street around 400 North.

Q. And were you in a patrol car?

A. I was.

Q. And you were on duty at that point?

A. Yes.

Q. Did you hear a call-out come over the dispatch at that point in time?

A. I did. I heard a shots-fired call from Elton Park and they gave a vehicle description heading westbound.

Q. Do you recall what that vehicle description was?

A. It was a – a blue passenger car with three people in the vehicle.

Q. Okay. How long after that car – after that call, what did you see?

A. About a minute later I was – I was stopped at the – the light to turn left, to go east on 400 North towards Elton Park. I observed a – a blue four-passenger car going west and there's a little bit of a hill right there but it – it was going at a high rate of speed and stopped a little bit past the white line, you know, it's kind of hard stop.

Q. Okay. Did you observe this vehicle to be a Mazda Protege?

A. I did. [108]

Q. Okay. And what did you see when you saw this vehicle in front of you?

A. Well, I knew it matched the description of what they called out. I could see that there was three people in the vehicle so I – I waited until the light changed green for them, and then that – they turned left to go southbound on Main Street there. I turned, initiated my lights to go through the red light for me and then I pulled the vehicle over in the parking lot of Hollywood Video.

Q. What did you observe – you indicated you pulled into the parking lot. What kind of parking lot was this?

A. I'm not sure what you mean.

Q. Well, was it a retail establishment or –

A. Kind of a small strip mall. There was a – there's Hollywood Video, there's a couple little stores on the south end. There's a Chinese restaurant and, like, a little pizza place.

Q. Okay. Where did you park in relation to the Mazda Protege when you pulled it over?

A. I pulled in behind it.

Q. How far was it where you stopped from Elton Park?

A. Watching the video, it appeared it was maybe 10, 15 feet.

Q. When you pulled the vehicle over and the vehicle stopped, did you approach the vehicle right away?

A. No. Another officer, Officer Bracken arrived almost [109] right after me and – and once we both jumped out together, we walked up together.

Q. How lon[illegible]fter you stopped the vehicle until Officer Bracken [illegible]ived?

A. She was calling out that she was arriving right there on the scene as I was still positioning my vehicle behind the – the Mazda.

Q. Okay. When your vehicle was behind the Mazda, did your vehicle have its lights on still at that point in time?

A. It did. I also had my spotlight shining inside the – their vehicle.

Q. Okay. So as you were sitting behind the vehicle, could you see what was going on inside the Mazda Protege?

A. I could.

Q. And what did you observe inside the Mazda Protege when you first pulled behind the vehicle?

A. I observed that there was three people in the vehicle, two people in the front, the driver and the front-seat passenger, and the left rear passenger, and the right front passenger was moving around a lot inside the vehicle.

Q. And the right front passenger moving around, did that cause you concerns?

A. It did, definitely.

Q. How come?

A. Whenever you see – that's what we call a furtive [110] movement, whenever we see someone moving around a lot inside a vehicle, it just raises our awareness, you know, especially on a call like this where possibly shots are fired. It's just – it's just something that we look it for. You're always – it's not normal, all that movement.

Most people kind of sit quietly, they may get in the glove compartment, but he was moving around a lot in the vehicle, even turning around.

Q. What was the driver doing?

A. Just nothing, just sitting in the driver's seat.

Q. And what about the back-seat passenger, what was that passenger doing?

A. Same thing, just sitting.

Q. And you were able to see inside the vehicle, correct?

A. I was.

Q. At some point you approached the vehicle, you said when Officer Bracken arrived. Did you have contact with the individuals inside the vehicle?

A. I did. Officer Bracken made a – driver's side approach and I made contact on the passenger's side with the front seat, and I was the one that initiated verbal contact with the – the people in the vehicle.

Q. What did you say to the people in the vehicle?

A. I explained to them who I was, you know, and, you know, Trooper Croft, highway patrol. The reason I stopped you is [111] because, you know, your vehicle matches a description of a shots-fired call.

Q. Okay. Did you get identifying information? You indicated you came up on the passenger's side, did you get identifying information from either of the individuals in the front seat of the vehicle?

A. I did. The driver, she did not have her identification with her, but the front-seat passenger gave me his identification.

Q. Did the driver –

A. Actually, a driver's license.

Q. Did the driver give you her name?

A. She did.

Q. What did she say her name is?

A. Vashti Perez.

Q. Okay. And you said the passenger in the front seat gave you some identifiers. What information did you get from the passenger?

A. He had a Texas driver's license and if I can refer to my notes here.

Texas driver's license with a license number, 10257266, and his date of birth. I wrote down, Justus C. Rosemond.

Q. And did you get information on the person in the back seat, who that was?

A. I did. As we were getting out of the – after we pulled [112] people out of the vehicle.

Q. Okay. Let me go back. So when you got the [sic] the driver's license information from Mr. Rosemond, was he inside the vehicle or outside the vehicle?

A. Inside the vehicle.

Q. And did you ask the individuals in the vehicle to step outside of the car?

A. I did. I asked Mr. Rosemond first to step out of the car.

Q. Did he comply with that request?

A. He did.

Q. And did you ask the other individuals to get outside the vehicle?

A. I actually did a pat down of Mr. Rosemond and then Officer Bracken pulled out the left-rear passenger, Mr. Joseph, and did a pat down of him and the last we pulled out Vashti.

Q. And you indicated Mr. Joseph. Just to clarify, who was the individual in the back seat, what was his name?

A. His name is Ronald Joseph.

Q. And you obtained his identifying information at the scene, as well?

A. Not actual – he gave me his name and date of birth, he didn't have an ID card with him.

Q. But he gave you that information at the stop? [113]

A. He did.

Q. Did you observe Mr. Rosemond – you indicated he got out of the front passenger's side. Did you observe if he had been wearing glasses that evening?

A. Watching the tape, I could see that there was glasses, that he was wearing glasses.

Q. You asked everyone to exit the vehicle. At some point did you ask for consent to search the vehicle?

A. I did. I asked Vashti if we could search the vehicle.

Q. Did she indicate she owned the vehicle?

A. She did.

Q. Did you later learn that vehicle was a 1996 Mazda Protege?

A. I did.

* * *

[116] Q. And, again for demonstrative purposes, Ms. Vashti Perez is not actually sitting in that actual seat but was she sitting in a bucket seat in her front seat of the 1996 Mazda Protege at the time that you stopped it?

A. She was in the driver's seat.

Q. The driver's seat. And, similarly, was Mr. Ron Joseph – or, excuse me, Mr. Justus Rosemond sitting in the passenger seat similar to the one depicted in this particular picture?

A. Yes, in the front passenger seat.

Q. Okay.

* * *

[117] Q. Now, when you searched the back seat of the vehicle, were there items in the back seat of the vehicle when you went to search it on August 26th, 2007?

A. There was a car seat.

Q. And where was the car seat in the vehicle?

A. It was on the – the passenger's side in the rear.

Q. Okay. And what – which side of the rear, you said passenger's side of the rear?

A. Yeah.

Q. And what was on the – who was on the driver's side in the rear?

A. Mr. – Mr. Joseph.

Q. Okay. Now, did you ask Ms. Perez for consent to search her vehicle that evening?

A. I did.

Q. Did she grant consent?

A. She did.

Q. Was there anyone in the vehicle when you sent to search it? [118]

A. No.

Q. Was there anything in the vehicle when you went to search it?

A. Just the car seat.

Q. Did that car seat impact your search?

A. We had to move it around. It was – it was somewhat in the way.

Q. And how – the back seat of this vehicle, how would you describe the size of it?

A. Small.

Q. And how much space would you say the car seat was taking up in the back seat?

A. I don't know feet or anything, but it was – it was – as I recall it was one of those with the big arm that comes up so it was taking up quite a bit of space.

Q. When you searched the vehicle, did you find any weapons or any contraband or any drugs?

A. No.

Q. After you identified the individuals, you indicated they were not in the vehicle. You conducted your search. What happened to the individuals that were in the car when you conducted your search?

A. Again, after I conducted my search, I made sure I identified all of them. And then let them get back in the vehicle and they went on their way. [119]

Q. Did you provide the identifying information regarding Ms. Perez, Mr. Rosemond, and Mr. Joseph to the Tooele Police Department?

A. I did.

Q. Now, there was a video that was taken of this incident; is that correct?

A. Correct.

Q. Why was there video taken of the incident?

A. It's standard practice. We – we try and record all our traffic stops.

Q. And are you aware on August 26th, 2007, whether or not your recording equipment was working at that point in this time?

A. It was.

Q. And where is the recording equipment on the car?

A. It's – it's a dash cam, it's mounted from the windshield that goes down a little bit.

Q. Okay. Are there also microphones involved with the recording equipment?

A. There are. There's an inside-the-car microphone and a belt mic.

Q. A belt mic, where is that?

A. It's just on my belt.

Q. And the video of this incident, where has it been kept since August 26th of 2007? [120]

A. In my office in my – my cabinet.

Q. Okay. And you previously reviewed this video, correct?

A. I have.

MS. FOJTIK: At this point the United States would offer Government's Exhibit No. 18.

You previously reviewed this, correct?

THE COURT: This is the video?

MS. FOJTIK: This is the video.

THE COURT: Any objection?

Mr. GREGERSEN: No objection.

THE COURT: 18 is received.

MS. FOJTIK: We request to publish this to the jury at this point in time.

THE COURT: You can –

MS. FOJTIK: If I may approach the witness, Your Honor, just to confirm.

THE COURT: You may and you may publish it.

(Government's Exhibit No. 18 was received into evidence.)

(Exhibit was published to the jury.)

Ms. Fojtik:

Q You've got in front of you Government's Exhibit – a disk that's government's Exhibit 18. Do you recognize that disk?

A. Again, that's the disk, copy of the actual traffic stop that I made.

Ms. FOJTIK: Okay. I'm going to go ahead and ask Miss Johnson [121] to play the video at this point in time.

(Videotape was played.)

MS. FOJTIK:

Q Can you describe what was occurring? Where's your vehicle at this point?

A. I'm facing south, that's the light at 400 North. I'm southbound on Main Street in the left-hand turn lane to turn left onto 400 North, but I had already observed the vehicle on the left side of the screen, matching the description and passing the white line. I'm just waiting for them to turn.

Q. Is anyone else in the vehicle during this time?

A. In my vehicle?

Q. In your vehicle?

A. No. That's the vehicle right there.

Q. And which way is that vehicle heading.

A. South.

MS. FOJTIK: If we could stop.

(Videotape was stopped.)

MS. FOJTIK:

Q. What was that that you just heard?

A. It was heading southbound. That's just probably radio traffic, maybe having to do with the incident, I kind of missed that little bit right there.

MS. FOJTIK: Okay. Go ahead.

(Videotape was resumed.)

MS. FOJTIK:

Q. Did you signal at this point in time?

A. Signal, I'm not sure. [122]

Q. The vehicle to stop?

A. Yeah. You can see that my lights are – lights are on. There's also a little indicator, the red emergency lights are on.

Q. Okay. You can see that on the left side of the screen but go ahead.

A. That's me talking. The vehicle is turning right.

(videotape was stopped.)

MS. FOJTIK:

Q. So that voice that we just heard indicated the plate was out of state. Who was that?

A. That was me.

Q. Okay.

A. I believe that was Officer Bracken just explained that she was going to be out with me, also.

Q. Okay. What can you see at this point in time?

A. I have my lights on, and also my spotlight on and I can see the interior of the vehicle. Also – so I can see – on this video it's shining a little bright but this was when I called out the plate to the vehicle.

Q. And you indicated it was an out-of-state plate, correct?

A. I did. I indicated that before and as I got behind it, you can hear my calling it out.

MS. FOJTIK: Okay. Go ahead.

(Videotape was resumed.)

MS.FOJTIK: Okay, Can you stop it. [123]

(Videotape was stopped)

MS FOJTIK:

Q. What did you see at this point in time?

A. I can still see the interior of the vehicle and I observed Mr. Rosemond moving around in the vehicle.

Q. And where is he seated?

A. The front passenger seat.

(Videotape was resumed.)

MS. FOJTIK:

Q. What is he doing at this point in time?

A. Just moving around a lot in the vehicle and you can see his head bobbing back and forth and – and you can see his face a couple of times as he's turning around.

(Videotape was stopped.)

MS. FOJTIK:

Q. Did you indicate about the speed they were traveling at?

A. They were hauling ass, almost going through the light. That was Becky Bracken who arrive on the scene.

MS. FOJTIK: Okay. Go ahead.

(Videotape was resumed.)

MS. FOJTIK:

Q. What did you see at this point in time?

A. Still – that's me walking up on the right.

(Videotape was stopped.)

MS. FOJTIK: Q And where is Officer Bracken at this point in time?

A. You can just barely see her elbow as she's coming on the screen on the left-hand side. [124]

Q. Okay. And at this point in time as you approach the car, had anyone else in the vehicle been moving?

A. Not that I observed.

(Videotape was resumed.)

THE WITNESS: That's Mr. Rosemond talking.

(Videotape was stopped.)

MS. FOJTIK:

Q. I was just going to say, who's speaking to you at that point in time?

A. That's Mr. Rosemond.

Q. And he's in the passenger seat, correct?

A. Yes.

* * *

[125] MS. FOJTIK:

Q. What are you doing at this point?

A. I'm going to do a pat down for weapons of Mr. Rosemond.

Q. Okay. And looking at this video, Just – do you see the individual that got out of that car that identified himself as Justus Rosemond here in court today?

A. I do.

Q. And can you identify the clothing he's wearing?

A. He's wearing a Dodger's jersey.

Q. No, the individual right now in court, I'm sorry.

A. A suit with a blue shirt and a tie.

Q. And that's the individual in the video that's wearing a Dodger's jersey; is that correct?

A. It is.

MS FOJTIK: Let the record please reflect the in-court identification of the defendant.

THE COURT: Yes. [126]

MS. FOJTIK:

Q. And di dyou also observe as he got out of the vehicle – did you see whether or not Mr. Rosemond had been wearing glasses?

A. There was a little glint, it's a little harder to see, you can see it a little bit better in –

MS. FOJTIK: Play the video.

(Videotape was resumed.)

(Videotape was stopped.)

MS. FOJTIK:

Q. Do you have some concerns with Mr. Rosemond's behavior at that point in time?

A. Yeah. He – he kept reaching – while I was searching him, you know, you don't want people reaching anywhere on their body until you've searched, obviously, just because, you know, make sure that there wasn't a weapon or anything and that's the point of the search that I was doing.

* * *

[127] A. I'm actually – I'm sending him to – another officer had walked up to the scene and there were several officers, county officers that were in the restaurant up there that walked out to assist.

Q. Okay. So you're sending him to sit with other officers?

A. Right.

Q. Okay.

(Videotape was resumed.)

MS FOJTIK: Hold on one second.

(Videotape was stopped.)

MS. FOJTIK:

Q. Now that you've had a chance to look, did you see what number was on that jersey?

A. You know, I wasn't paying attention. I apologize.

Q. We'll just let that go.

MS. FOJTIK: Okay. Go ahead and hit play. [128]

(Videotape was resumed.)

(Videotape was stopped.)

MS. FOJTIK:

Q. That's Ms. Perez getting out of the front seat?

A. Right.

(Videotape was resumed.)

(Videotape was stopped.)

MS. FOJTIK:

Q. It's a little hard to hear on the tape. What did you ask Ms. Perez at that point in time?

A. If I could take a look inside her vehicle. I explained to her that her vehicle matched the description of a vehicle seen in a shots-fired call and I asked her if I could look in the vehicle and if that was okay.

MS. FOJTIK: Okay. Go ahead.

(Videotape was resumed.)

MS. FOJTIK:

Q. And what are you doing now?

A. We're just starting the search of the vehicle.

Q. Where did you look in the front seat.

A. In the glove compartment, under the seat, in between the seat, and we try and take it in a section kind of search.

Q. Officer Bracken was looking in the back seat?

A. Yeah.

(Videotape was stopped.)

MS. FOJTIK:

Q. Did you recall if there was a car seat in the back of the vehicle?

A. There was. I believe I moved it around a little bit [129] later so I could get into the back seat, too.

Q. Okay.

MS. FOJTIK: Go ahead.

(Videotape was resumed.)

THE WITNESS: So I was careful of the door because I didn't want anything falling out.

(Videotape was stopped.)

MS. FOJTIK:

Q. Did you move the car seat when you looked in the back?

A. Just a little bit. I moved it around a little and everything.

Q. Okay.

MS. FOJTIK: Go ahead.

(Videotape was resumed.)

THE WITNESS: It's kind of skipping.

(Videotape was stopped.)

THE WITNESS: I asked Officer Bracken if she had searched the back seat and she said she had.

Ms. FOJTIK: Okay.

(Videotape was resumed.)

THE WITNESS: Okay. I was looking in the glove compartment there. I had him open that for me --

(Videotape was stopped.)

THE WITNESS: —I couldn't get in the glove compartment there because it was locked or something. [130]

MS. FOJTIK: Okay.

(Videotape was resumed.)

THE WITNESS: I let her work on the trunk.

(Videotape was stopped.)

MS. FOJTIK:

Q. So you don't know what Ms. Bracken's doing at this point in time, why she climbed in the back seat?

A. Yeah, apparently you can't open the trunk from the outside so she laying down in the back seat so she can climb in through and pull the latch from inside?

A. Right.

Q. Okay.

(Videotape was resumed.)

THE WITNESS: She pulls out a spare tire. I don't remember, whatever it is.

MS. FOJTIK:

Q. What are you doing at this point in the tape, we can't see you on the video?

A. I'm still probably just rechecking what was in the vehicle, making sure I didn't miss something. The standard in trying –

(Videotape was stopped.)

THE WITNESS: —even if one officer searches an area, another officer will try and search the same area just to make sure that one of them didn't miss it.

MS. FOJTIK: Okay. [131]

(Videotape was resumed.)

MS. FOJTIK:

Q. What's Officer Bracken doing? Is she still searching?

A. Yeah. Just searching the vehicle.

(Videotape was stopped.)

MS. FOJTIK:

Q. Did you do any other search of the vehicle after that point in time?

A. I didn't. I don't believe so.

Q. Okay. And what happened at the end of this stop?

A. I – I went over and talked to the three subjects again, just kind of confirm their information. They were chatting with me about my car and, you know, the police packages. I had a new Dodge Charger and I sent them on their way.

Q. Did you at any point recover a weapon or contraband from the vehicle?

A. I did not.

Q. How would you characterize the search you did of the vehicle?

MR. GREGERSEN: Objection. Vague.

THE COURT: Overruled. You can answer.

THE WITNESS: I thought I had done a fairly good search but as you can see, I didn't move from one area and go exactly around. I didn't tear the car apart. It's kind of a term we've used before. I was a little bit – I was sure this was the vehicle but I wasn't sure that the gun was in there [132] and I felt I had done a good-enough search to say that it wasn't the vehicle.

Q. And you, in fact, you didn't take any cushions out of the vehicle?

A. I did not.

* * *

[132] **CROSS-EXAMINATION**

* * *

[133] MR. GREGERSEN:

Q. And show you Exhibit F. Can you identify what that is?

A. There's the vehicle in the background, there's me and then there's Mr. Joseph.

Q. That's Ronald Joseph shown in that photo, correct?

A. Correct.

Q. And he has on a blue jersey, correct?

A. Correct.

Q. Can you make out what number is shown on there? [134]

A. Looks like 18.

Q. So just to be sure, he had a jersey with a No. 18 on it, correct?

A. Correct.

Q. Do you know whether that's the jersey that Peyton Manning wears?

A. I didn't know sports at all.

THE COURT: Do you want me to take judicial notice of it?

MR GREGERSEN: Yes, please Judge.

MS. FOJTIK: We don't object to that, Your Honor.

THE COURT: All right.

Mr. Gregersen: Q And, Officer, you found no gun, correct?

A. Correct.

Q. And when you saw – you indicated that Justus Rosemond was moving around in the car. That increased the level of your suspicion, correct?

A. It did.

Q. And in light of that, isn't it true that you searched this car even more thoroughly as a result of that?

A. It was kind of a city case. Like – I felt like I was assisting. I was kind of hoping Officer Bracken would take a little bit more of a lead.

Q. So you see –

A. I didn't want to step on her toes. [135]

THE COURT: Let him finish his answer.

MR. GREGERSEN: Apologize, Your Honor, I'm sorry.

THE WITNESS: So I pushed as much as I felt like I could as being an assisting Officer, but I didn't – it wasn't exactly my case.

MR. GREGERSEN:

Q. So you're saying even though you had those suspicions, it did not cause you to search any more thoroughly.

A. I don't think so.

Q. Now, in the car you looked specifically for a gun, correct?

A. Correct.

Q. And you looked for bullets?

A. Correct.

Q. You used the flashlight?

A. Right.

Q. You had another officer assisting you?

A. Correct.

Q. And you didn't find a gun?

A. That's correct.

Q. You didn't find any drugs?

A. No.

Q. You didn't find any bullets?

A. Correct.

* * *

APPENDIX N

[Trial Transcript – December 14, 2010]

* * *

[11] **COBY PAINTER**

* * *

THE CLERK: * * * Please, state your name and spell it for the record.

THE WITNESS: Coby Jack Painter, C-O-B-Y, J-A-C-K, P-A-I-N-T-E-R.

* * *

[12] **DIRECT EXAMINATION**

* * *

[14] MS. FOJTIK:

Q. Was anybody else involved in buying this pound of marijuana other than Vashti?

A. Yes, Ricardo. First she called me on my cell phone, asking me about it and asked me where Ricardo was. I told her I didn't know at the time. And then she told me about the deal and I was going to buy it and I got ahold of Ricardo, he kind of knows her more and so then we both kind of talked to her about buying a pound of marijuana.
Q. And did she indicate a price for the pound of marijuana?

A. Around 800.

Q. And did you know Vashti prior to that phone call?

A. I had met her a couple of times just at parties. It wasn't like – I really didn't know how she got my number but I had met her and if I seen her on the streets, I'd know who she was and stuff. I had met her at parties so she was an acquaintance I'd say.

Q. I'm sorry. I didn't hear that.

A. She was an acquaintance, I would say.

Q. So who else was involved in buying this pound of marijuana? You indicated Vashti, Ricardo Gonzales, anyone [15] else involved that you know of?

MR. GREGERSEN: Objection. Leading. I'm also concerned about the calling for hearsay, that is, beyond the scope of establishing a conspiracy. I'm concerned that this witness will be testifying to things beyond the conspiracy and also concerned about the admission of this substantively

THE COURT: I'm not sure I understand the objection. Do you have an objection to this particular question?

MR. GREGERSEN: Yes. He's already testified as to who was involved and the prosecutor has asked who else was involved.

THE COURT: Well, he can answer that question, if anyone was. Go ahead.

THE WITNESS: It was me, Ricardo. She told me that there's two guys from Texas that had the marijuana, that they had a point that they wanted to get rid of. They had more weed, that's why he was getting rid of it for so cheap, that it was only 800 because he wanted to get back to Texas. I don't know their names. She didn't – at the time she didn't say their names but –

MS. FOJTIK:

Q Did you learn their names?

A. No.

* * *

[16] Q. Now, after the phone calls with Vashti you said – where did you agree to meet for the purposes of this deal?

A. In the middle of Elton Park, there's a parking lot there.

Q. And this, again, is on August 26th of 2007?

A. Yes, ma'am.

Q. What time of night was it when you went to the park?

A. I would say around 9 o'clock.

Q. And was that the time the deal was supposed to take [17] place?

A. Yes, ma'am.

Q. And describe again, how did you get to the park now?

A. Me and Ricardo walked there.

Q. And it was only you two that went to the park?

A. Yes, ma'am.

* * *

[18] Q. Okay. So when you first got to the park, you didn't immediately go to the car?

A. No, ma'am.

Q. Did you see the car in the parking lot?

A. Yes, ma'am.

Q. Did you know if that was Vashti's car?

A. I didn't know for sure.

Q. Did Ricardo appear to know?

A. I'm not sure. That's where we told them to park. We told them we would meet them inside of the parking lot right there. So we assumed that's where they were. I'm not sure if Ricardo knew – he knew her better so I'm not sure if he knew that was her car or not.

Q. Okay. You indicated Ricardo walked towards the parking lot. Could you see him from where you were?

A. Yes, ma'am.

Q. How could you see him? You said it was at night?

A. Yeah, that parking lot's pretty lit up. There's street lights all over. I couldn't see inside the car but I saw him [19] walking through to get into the back seat.

Q. So you observed Ricardo get into the back seat of the car?

A. Yes, ma'am.

* * *

[20] Q. Let me go back. You said, "He was in the back seat behind the driver," who was?

A. Ricardo.

Q. And that's Ricardo Gonzales?

A. Yes, ma'am.

Q. As you walked over to the car could you see where anyone else was seated in the car?

A. Yes, ma'am.

Q. Who was seated in the driver's seat?

A. Vashti.

Q. And you recognized her?

A. Yes, ma'am.

Q. Did you see any other individuals in the car?

A. Yes, ma'am. [21]

Q. How would you describe them?

A. Two black males around my age.

Q. Okay. And where were they sitting in the car?

A. In the front seat, passenger, and then in the back seat passenger or behind the passenger.

Q. Okay. Now, as you approached the car and as Ricardo whistled you over, did you and Ricardo have a plan as to what was going to happen with that marijuana?

A. Yes, ma'am.

Q. What was your plan?

A. Steal the marijuana.

Q. Why did you decide to do this?

A. We couldn't come up with the $800 and we wanted it.

Q. And when you approached the car and you saw Vashti and two other individuals in the car, were you surprised by that?

A. No. I'm not –

Q. What was your plan for how you were going to steal the marijuana?

A. Ricardo was going – like I said, Ricardo was going to set up the deal and call me over and when he showed me that he had possession of the marijuana, he was going to ask me if I wanted it, to buy it, and when I said yes, he was to hit whoever was closest to him and we were going to take off running.

Q. He was going to take the marijuana? [22]

A. Yes, ma'am.

* * *

[24] Q. Now, you indicated that there were two African-American males in the vehicle. Do you recall any characteristics about the individual in the front seat?

A. Not of his body. I know he was wearing a blue jersey.

Q. Okay. How about the individual in the back passenger seat, do you recall any unique characteristics about that individual?

A. He was bald and wearing glasses.

Q. What did Ricardo do then after when he decided to punch the individual in the back seat?

A. He punched him and then we took off running.

Q. Okay. And describe exactly which of the individuals Ricardo punched.

A. The one in the back seat with the glasses and bald head.

Q. What did Ricardo do after he punched him?

A. Grabbed the – he already had possession of the marijuana, it was on his lap, so he used his left hand, hit [25] him and just turned and ran. Right when he hit him, I already knew that – that we were going.

So I ran and so Ricardo's right next to me running and so we took off.

Q. Okay. At that point when you were leaving the vehicle, do you remember which way you started running?

A. We both started running – I'll use this thing.

Q. If you want to just describe it.

A. Okay. We started running on the north side of the tennis courts through the parking lot, but we hadn't made it to the grass yet. That was the directions we were headed at first.

And then –

Q. Then what happened?

A. We heard gunshots like right behind us. It was like pretty much bullets just flying by our heads and it sounded like – like I heard zoom, it was crazy. And I turned and went left. So Ricardo had the marijuana and he started – kept on going through the park. So I figured they were shooting at him to get the marijuana so I went left.

Q. When you say you went left, does that mean –

A. I went on the south side of the tennis courts toward Broadway.

Q. Down towards Birch Street?

A. Yeah.

A. Could you see – when the shooter got out of the car, could you see where the shooter got out of the car? [26]

A. No, Ma'am.

Q. How many shots do you remember hearing?

A. Between about eight or nine, it was a lot of shots.

Q. Were you able to see a gun or any kind of weapon?

A. No, ma'am.

* * *

[27] MS. FOJTIK:

Q. Did you get together with Ricardo that night?

A. Yes, ma'am.

Q. When did you get together with him?

A. About an hour later, I'd – I ran over across Broadway and into the backyard of a house and hid there for a while. I didn't know if they would be driving around or anything. And I got ahold of him and he had came [sic] to pick me up.

Q. Who came to pick you up?

A. Ricardo.

Q. Is that how you got home that night?

A. Yes, ma'am.

* * *

[31] MS. FOJTIK:

Q. When you testified earlier you didn't mean that the individual in the back seat could be the shooter, were you guessing?

A. Yes, ma'am.

Q. What was the basis of that guess?

MR. GREGERSEN: Objection. Guesses are not allowed, in general, and then if you have a reason for a guess it would be inadmissible.

MS. FOJTIK: It explains his testimony earlier, your Honor, I think it's clear that that was speculative. And his testimony was –

THE COURT: I'll let him answer. [32]

THE WITNESS: Just for the fact that I – when he had the weed and Ricardo turned to punch him, I turned my back and ran. So I couldn't really see. I couldn't see who was actually the shooter. I just assumed it because the guy got punched.

MS. FOJTIK: Q. So did you actually see the shooter?

A. No, ma'am.

MS. FOJTIK: No further questions.

THE COURT: Thank you, Ms. Fojtik.

Mr. Gregersen, you may cross-examine.

CROSS-EXAMINATION

BY MR. GREGERSEN:

Q. You mentioned that you have an immunity agreement with the government, correct?

A. Yes, sir.

Q. And, in essence, you're being compensated for your testimony today by the government agreeing not to prosecute you, correct? That is, even though they're not paying you money, they're giving you something else, that is, agreeing not to prosecute you and have you risk jail, correct?

A. Yes, sir.

Q. And you want the government to be pleased with your testimony, correct?

A. Yes, sir. [33]

Q. I assume you don't want to have the consequences from the government, correct?

A. Yes, sir.

Q. Now, you talked about there were two black males in the car, correct?

A. Yes, sir.

Q. And there was a black male in the front passenger seat; is that correct:

A. Yes, sir.

Q. Did you speak with him while you were in the car?

A. No, sir.

Q. Did you observe Ricardo speak with him?

A. No, sir.

Q. Did you see or hear him speaking with anyone?

A. No, sir.

Q. Did you see him turn around and look at you?

A. No, sir.

Q. Isn't it true that the entire time that you were there, he did not turn around and he did not say a word to either of you?

A. Yes, sir.

* * *

[35] **REDIRECT EXAMINATION**

BY MS. FOJTIK:

* * *

[36] Q. And what happened with the marijuana that evening?

A. I believe – I believe me and Ricardo both stayed there that night and the next day me and him had split it up fifty – fifty, kept it. I remember – Ricardo actually wasn't the one that picked me up. It was a friend of ours. I called Ricardo to come and pick me up, but I remember she came and picked me up and took me to where Ricardo was.

Q. Okay. So Ricardo didn't it pick you up in the car?

A. No, ma'am.

Q. Someone else picked you up?

A. Yes, ma'am.

Q. Do you recall who picked you up?

A. Val – Valerie Goings [phonetic], I believe, or – I'm not sure of her last name.

Q. And how did you get ahold of her?

A. Ricardo got ahold of her. When I called Ricardo, he said he was going to come and pick me up and he called me back on my cell phone, he said, Be ready, Val's going to be out front, you should be looking for her car.

* * *

[37] **RECROSS-EXAMINATION**

BY MR. GREGERSEN:

* * *

Q. Earlier today as we were right here, if I understood you correctly, you said that Ricardo picked you up, correct?

A. Yes, sir.

Q. And now you're saying that it was actually Valerie Goings that picked you up; is that right?

A. Yes, sir.

* * *

APPENDIX O

[Trial Transcript – December 14, 2010]

[38] **RICARDO GONZALEZ**

* * *

THE CLERK: * * * State your name and spell it for the record.

THE WITNESS: Ricardo Gonzales. R-I-C-A-R-D-O G-O-N-Z-A-L-E-S.

THE COURT: Can you hear him all right? Go ahead.

MS. FOJTIK: Make sure you speak into the [39] microphone.

THE WITNESS: Sorry about that.

DIRECT EXAMINATION

BY MS. FOJTIK:

Q. Mr. Gonzales, where are you currently residing?

A. Tooele County Detention Center.

Q. And what are you in the detention center for?

A. Attempted robbery.

* * *

[42] Q. Was Vashti acting as the middleman in this deal?

A. Yes.

Q. Did you talk to Coby about the marijuana deal?

A. Yeah. I told him, you know, if he would come – come with me to Elton Park, just be my wingman.

Q. And I need you to speak up a little louder. Which park?

A. Elton Park.

* * *

[44] Q. Okay. Let me take you back for a minute. You say walked past the tennis courts. Did you get in the car that was in the parking lot?

A. Yes.

Q. Did you know it was Vashti's car?

A. Yeah, because it was blue and, yes, I did.

Q. So you recognized the car.

A. Yes.

Q. And when you first got in the car was Coby with you?

A. No.

Q. What was Coby doing when you first approached the car?

A. He was waiting for me in the back, waiting for me close by Broadway. [45]

Q. So he didn't get in the car?

A. No.

Q. He stayed back in the park?

A. Yes, ma'am.

Q. Why did he do that?

A. Just because I was – I was the one that was called to meet Vash, not – so it was just basically me and her talked.

Q. Okay. When you got to the car, did you see Vash?

A. Yes.

Q. Where was she sitting?

A. She was driving the car.

Q. Okay. Did you observe anyone else in the car?

A. I observed that there was two black males in there.

Q. Okay. Where were they sitting?

A. One was riding – one was riding passenger and one was riding in the back seat where the passenger is.

Q. Were you surprised to see those people in the car?

A. Yeah, kind of.

Q. How come?

A. Because usually when she calls me she comes by herself.

Q. So you've had dealings with Vash involving marijuana before?

A. No. Just when she comes to talk to me she's by herself.

Q. You indicated you got in the car the first time. Where did you get into the vehicle? [46]

A. On the driver's side in the back seat.

Q. When you got into the vehicle, what did you observe?

A. I observed that the guy in the front wasn't looking at me, he stayed looking forward. The guy that was next to me was in an Indianapolis Colts

jersey and he was kind of muscly. And – and there was weed – there was weed sitting next to me in the middle of the car.

* * *

[48] Q. When you were looking at the marijuana and you were in the car that first time, did Coby come to the car at that point?

A. No. At that point I told Vash, I'm going to go talk to my friend and I'll be back and I'll let you guys know if I'm going to get it or not.

Q. Did you speak – do you remember speaking to anyone other than Vash?

A. No, I did not.

Q. And you actually physically got into the car at this point in time?

A. Yes, ma'am.

Q. And just to be clear, the marijuana you looked at was not chronic?

A. No, ma'am.

Q. So you went back. Did you go back and talk to Coby or how did you get Coby to the vehicle?

A. Well, I walked back and I said – I told Coby, if they're going to try to charge for more, I'm just going to take it from them.

Q. So you and Coby made a plan to rob the dealer. [49]

A. I made the plan, he just – he just followed my lead.

Q. Why did you do that?

A. Honestly, just because I didn't know them. I didn't think it would come back to me.

Q. So you went back to the car a second time?

A. Yes, ma'am.

Q. What were you thinking about when you went back to the car the second time?

A. I wasn't really thinking too much. I was just trying to just go with the flow and see what Vashti was saying and they were – they're just like, Are you going to buy it or not and I was –

Q. Let me just take you back, real quick, one question. How long were you in the car the first time you were looking at that marijuana?

A. Just around three to five minutes, not very long at all.

Q. The second time you went back to the car, how long were you in the car?

A. A minute.

Q. Did you talk to anybody?

A. Vash.

Q. And what did you say to her?

A. I said, I don't think I'm going to be getting this from you. I'm going to have to pass.

Q. Do you recall if Coby came over near the vehicle? [50]

A. No. He stayed back. Closer to the other side of the – the tennis courts where the parking lot is, he was – he was closer to –

Q. Was he near the tennis courts?

A. Yes.

Q. What happened when you decided to rob the – what did you do?

A. I – I looked at the big guy, I looked toward the big guy and he wasn't looking at me so I just swung with my left hand and then grabbed the weed and I started running.

Q. So his face was turned away from you?

A. Well, he was looking straight. He wasn't turned toward me, he was just looking straight.

Q. Not looking at you?

A. Yeah.

Q. Do you recall where on his body you punched him?

A. Somewhere in the chin, cheek area.

Q. Do you know if you connected?

A. Uh-huh, I'm pretty sure I did.

Q. What did you do with the pot at that point in time?

A. I grabbed it and started running towards Broadway.

Q. What happened as you were running towards Broadway?

A. I started hearing gunshots.

Q. Which way were you running, towards where?

A. I was running west. [51]

Q. Towards Broadway?

A. Yes, ma'am.

Q. Do you remember if you were north or south of the tennis courts?

A. North.

Q. How long after you robbed the marijuana and you were running out of the vehicle before the shooting started?

A. Simultaneously, like within – before I even got halfway out – halfway past the tennis courts. I wasn't even past the tennis courts yet. So by the time I jumped over the – the cement little wall that's right there by the tennis courts, I was getting shot at by then.

* * *

[52] Q. Did you see the shooter?

A. No, ma'am. I didn't stop and look. I didn't stop and turn around.

Q. Did you see a gun?

A. I did not see a gun.

Q. When you were looking at the marijuana did you notice a gun?

A. No, I wouldn't have did it, if I seen a gun.

Q. Where was Doby?

A. By the time I punched him and started running, he was gone. I don't know, I think he ran, like, south.

Q. Okay. You didn't see him?

A. No. I didn't see him. He didn't run the same way I did, I know that.

* * *

[59] MS. FOJTIK:

Q. Just to be clear. When you were in the back seat, Mr. Gonzales, when you were sitting next to the

individual that was providing you the marijuana, did he ever turn his body and face you at any point in time or did he stay facing forward?

A. He didn't turn his whole body, he was kind of – he was pretty big for that back seat, it was pretty small. He just kind of turned like this, I seen one side of this face like this, I didn't see the whole side of his face.

MS. FOJTIK: Let the record reflect the witness has indicated a shrug towards his head.

Q. Towards the left side?

A. He turned left.

Q. So towards the left side. But you never saw the front of his face?

A. Yes.

* * *

[60] **CROSS-EXAMINATION**

BY MR. GREGERSEN:

* * *

[61] Q. The person in the back seat of this blue vehicle, did I hear you correctly that you described him as wearing a jersey?

A. Yes, sir.

Q. And do you recall the number on that jersey?

A. Number 18.

Q. And it was a blue jersey; is that correct?

A. Yes, sir.

Q. And does that have a significance to you that's – do you know who?

A. Peyton Manning.

Q. Is that – to your understanding that's the jersey that Peyton Manning wears; is that right?

A. Yes, sir.

Q. And who is Peyton Manning, to your understanding?

A. He's the quarterback of Indianapolis Colts.

Q. And that's the person that was in the back seat – I'm sorry. I don't mean to say that Peyton Manning was. But in the back seat was the person –

A. Person wearing his jersey.

Q. —wearing the jersey.

A. I know the number because it was on the left side of his arm.

Q. Oh, I see. So you saw that also there, the number 18 correct?

A. Yes.

* * *

APPENDIX P

[Trial Transcript – December 14, 2010]

[63] **VASHTI PEREZ**

* * *

THE CLERK: *** Please state your name and spell it for the record.

THE WITNESS: Vashti Perez. V-A-S-H-T-I.

THE COURT: Last name?

THE WITNESS: P-E-R-E-Z.

* * *

[64] **DIRECT EXAMINATION**

BY MS. TRAVIS:

Q. Now, are you the Vashti or the Vash that set up a drug deal with Ricardo Gonzales and Coby Painter on August 26th, 2007?

A. Yes.

THE COURT: Speak up.

THE WITNESS: Yes.

MS. TRAVIS:

Q. And were Ricardo Gonzales and Coby Painter buying drugs or were they selling drugs:

A. Supposed to be buying.

Q. And were you the seller of the drugs?

A. No, not –

Q. Who was the seller?

A. Justus. [65]

Q. And when you say "Justus," do you know his last name?

A. Only by the subpoena.

Q. All right. So you were the middleman in this deal between Justus and Ricardo and Coby?

A. Yes.

Q. And how did you know Justus?

A. I just met him that night.

Q. Did you meet him – was there somebody that you had in common that knew both of you that introduced you?

A. I was dating someone who knew him.

Q. And who was that person?

A. Tracy.

Q. Is that Tracy Joseph?

A. Yes.

Q. Ms. Perez, do you see Justus in the courtroom here today?

A. I wouldn't recognize him. I only seen him that one night and I've never seen him again.

Q. Can you – do you know, was he a male black?

A. Yes.

Q. What drugs was with Justus selling?

A. Pot.

Q. And is that marijuana?

A. Marijuana, yes.

Q. And do you recall how much marijuana he was selling or he wanted – or was being sold to Ricardo? [66]

A. I don't.

Q. Do you recall the price?

A. No.

Q. How did you set up this deal?

A. I called.

Q. And who did you call?

A. I called Coby's mom.

Q. Did you talk to Coby?

A. I talked to him one – him or the other one. I can't really remember which one I talked to.

Q. So you're saying you talked to either Coby or Ricardo?

A. Yeah.

Q. Where did you make plans to meet to do this deal?

A. Yes.

Q. And where did you make plans to meet?

A. Well, the locations changed several different times and then we ended up meeting in the park.

Q. And what park was that?

A. Elton Park.

Q. You – are you from Tooele?

A. No.

Q. Are you – but you know where Elton Park is.

A. Now, I do. I didn't know the name of it at the time.

Q. So what time of day was this deal to take place?

A. I'm sorry? [67]

Q. What time of day was the deal to take place?

A. I don't recall the time.

Q. Did you go to the deal?

A. Yes.

Q. Did anyone go with you?

A. Yes.

Q. Who went with you?

A. Justus and Ronald.

Q. And Ronald who?

A. Joseph.

Q. And Ronald Joseph. How did you – the three of you get to Elton Park?

A. I drove.

Q. You drove your car?

A. Yes.

Q. And was your car at that time a 1996 Mazda Protege?

A. Yeah.

Q. And what color was your car?

A. I say it's green, other people say it's blue.

Q. And you were driving to the park? What did you do when you arrived at Elton Park?

A. Got out to talk to Ricardo.

Q. And do you recall where you parked?

A. In the parking lot.

Q. In the parking lot. [68]

Could we pull up Exhibit 1?

Ms. Perez, do you recognize what that is a photograph of?

A. Not really from up top. But –

Q. Does that appear to be Elton Park?

MR. GREGERSEN: Objection. Leading.

THE COURT: It's sustained.

MS. TRAVIS: Q. You don't recognize that?

MR. GREGERSEN: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Yeah. It looks like the park.

THE COURT: Looks like what?

THE WITNESS: The park.

MS. TRAVIS:

Q. And you said you parked in the parking lot.

A. Yeah.

Q. What, if anything, did you do after you parked?

A. What did I do after?

Q. Yeah.

A. Got out. Got out to talk to Ricardo.

Q. And did you do anything else with the car?

A. No.

Q. Did you remove something from the vehicle?

MR. GREGERSEN: Objection. Leading.

THE COURT: Well, overruled. Go ahead and answer the question.

THE WITNESS: Yeah. I took out a baby seat that I [69] had in there, a car seat.

MS. TRAVIS:

Q. And where was that car seat?

A. On the – behind the driver's side.

Q. So you removed that?

A. Yes, so he could get in.

Q. So Ricardo –

A. Yes.

Q. —Ricardo could get in?

A. So you talked to Ricardo. After you talked to Ricardo, what happened?

A. He followed me to the car and got in and started talking to Justus.

Q. And where was Justus sitting at that time?

A. In the back seat.

Q. Did Justus have the marijuana?

A. I think so.

Q. You think so. Did you see the marijuana?

A. I wasn't looking in the back but it was wrapped up in something.

Q. Did you hear Justus and Ricardo talking about the marijuana?

A. I was trying not to listen.

Q. So what happened after Ricardo got in the back seat with Justus? [70]

A. Next thing I knew there was – he hit him or something and he – or, no. He – he left and then came back with Coby and then they were talking and

then – and then – and then he hit Justus, I think, and then they took off running.

Q. All right. When you say "he hit Justus," who hit Justus?

A. I – Ricardo.

Q. And did Ricardo do anything else?

A. No.

Q. Did you see – where did Ricardo go after he hit Justus?

A. They – I think they took the stuff and took off running.

Q. When you say "the stuff," do you mean that –

A. The marijuana.

Q. – that Justus – or they took the marijuana?

A. Yeah.

Q. So it's your testimony Ricardo Hits Justus, he and Coby grab the marijuana and they run?

A. Yes.

Q. What happened then?

A. We all got out.

Q. And is that all of you, Ronald, you, and Justus?

A. Yes.

Q. And what happened then?

A. I heard the gunshots and I just froze, I was in shock.

Q. Did you see who did the shooting?

A. No. [71]

Q. Now, you were interviewed by police on September 5th of 2007; do you recall that, Ms. Perez?

A. I don't recall the date. There was several occasions.

Q. You told them on that day – in fact, you told them on that date who fired the gun, didn't you?

A. Yes.

Q. And do you now – do you remember making that statement?

A. I remember talking to them a lot and telling them several different things. And then they kept coming to my house, to my job, and so I finally said what I possibly thought happened.

Q. You told them that Justus did the shooting.

A. That's what I thought.

Q. All right. You didn't tell them that's what you thought.

You told them that's what happened.

MR. GREGERSEN: Objection. Argumentative and leading

THE COURT: Overruled.

MS. TRAVIS:

Q. Ms. Perez, did you fill out a written statement? I'm going to show you what's been marked for identification as Government's Exhibit 22. Is that your handwriting on that document?

A. Yes.

Q. Did you sign that document?

A. Yes. [72]

Q. And what's the date of that document?

A. September 5th.

THE COURT: What is it? What's the date?

THE WITNESS: September 5th, 2007.

MS. TRAVIS:

Q. Would you please read that document to yourself?

A. Oh. Uh-huh.

Q. Does that refresh your recollection as to what happened the night of August 26th of 2007?

A. Kind of, yeah.

Q. Kind of? Does it or doesn't it, Ms. Perez?

A. Yes. To a certain point, I guess you could say.

Q. Who fired the gun?

A. Well, I didn't see him fire the gun but in my mind that's what I thought happened, because my back was turned.

Q. And is that based on the placement where Justus was and where Ronald was?

MR. GREGERSEN: Objection. She's been – she's being asked to answer something she already said she didn't see.

THE COURT: She's entitled to ask her a question about why she said what she said or might have said what she said. So she can answer that question. I mean, if she's able to. Do you have the question in mind?

THE WITNESS: I don't know what you mean. [73]

THE COURT: Reask the question.

MS TRAVIS:

Q. You testified you didn't see the actual firing of the gun.

A. Yes.

Q. But you told the police Justus did the shooting and you're saying now you base that on what happened and I'm asking you was that based on where people were and where they were standing and how – and where you heard the shots?

MR. GREGERSEN: Objection. The question is compound because of its length and all the things that she's asking the witness to admit.

MS. TRAVIS: I'm trying to get an explanation as to why she thought Justus –

THE COURT: Yeah. Just ask that. Yes.

MS. TRAVIS:

Q. Why did you think Justus fired the gun?

A. Probably because it was his stuff and I –

THE COURT: I can't hear you, because of what?

THE WITNESS: Because it was his stuff, his marijuana, and I – I didn't know he had a – he brought a – everything wrapped up but I – heard the shots and I was froze, facing – watching everyone run, two guys, and I seen someone else out the corner of my other eye running and then we all got back in.

MS. TRAVIS:

Q. But you told the police – and you never qualified your statement, you didn't tell them that night, Oh, [74] I thought it was Justus. You said, "Justus did the shooting," you told them that on September 5th of 2007?

A. Yes.

Q. Do you recall how many shots you heard?

A. I don't.

Q. After the shooting stopped, you said then everybody jumped back in the car?

A. Yes.

Q. Were you driving as you left the park?

A. Yes.

Q. Were you driving pretty fast?

A. I was trying to catch up to the other guys that took the stuff.

Q. So you were chasing them in the car?

A. Yes.

Q. So do you remember what route you took out of Elton Park.

A. We just went back on that street. I think it's Broadway. We went back on Broadway and went up to the nearest stoplight by Main Street.

Q. Would that have been 4th North.

A. I think so, yes.

Q. Do you remember at that point in time you said everybody jumped back in the car and Justus had been in the back seat, where was Justus sitting at that point?

A. I don't remember the – how they got back in. [75]

Q. So you don't remember where everybody was sitting?

A. No.

Q. Do you recall anything that anyone said in the car, either Justus or Ronald Joseph as you were leaving Elton Park?

MR. GREGERSEN: Objection. Calls for hearsay.

THE COURT: Overruled.

THE WITNESS: There was a lot –

THE COURT: There's a clear exception there, of course.

MR. GREGERSEN: My concern is it's calling for what Ronald Joseph may have said.

THE COURT: Well, he's going to testify, isn't he?

MS. TRAVIS: He is going to Testify, Your Honor.

THE COURT: Overruled.

MS. TRAVIS: Q. Do you recall anything said?

A. There was a lot of commotion.

Q. Do you recall overhearing anything anyone said? Specifically not commotion, anything specific?

A. Not really.

Q. All right. You mentioned to the jury earlier that there were several interviews by the police?

A. Yes.

Q. We talked about one on December 5th of 2007. You were also interviewed, do you recall, on August 28th of 2007? Do you recall that interview? [76]

A. I don't remember the dates. But –

Q. All right. This was an interview you were actually taken into custody for obstruction of justice prior to that interview. Do you recall that?

A. Yes.

Q. During that interview you told the detectives that one of the men in the car with you, either Justus or Ronald Joseph, said, I don't want to touch the gun. Do you recall making that statement to police?

A. Vaguely. I know there was a lot of – you know, a lot of commotion, a lot of – you know, me I was – I was very, very much in shock. And, I mean, it was really hard after all of these years to really pinpoint what I did say and everything.

Q. You do not recall making that statement to police?

A. Not really.

Q. All right. Let's go back then – let's go back to the events of August 26th, 2007. You're driving away from Elton Park. As you left, as you hit the area of 400 North and Main Street, were you pulled over by a trooper of the Utah Highway Patrol?

A. Yeah.

Q. And do you remember when his overheads went on?

A. Uh-huh.

Q. Is that a yes?

A. Yes. [77]

Q. When those overheads went on, did you see a gun?

A. No.

Q. Let's go back to the interview, September 5th, 2007, with the detectives. This is not in your written statement but this is prior to your written statement. Do you remember you told the detectives that when those overheads went on and the cops were pulling

you over, that Justus hid the gun, do you remember making that statement?

A. No, I don't.

Q. All right. I'm going to take you back now again, August 26th, 2007, back to the stop that you've now been pulled over by the Utah Highway Patrol. Did you give the trooper consent to search your car?

A. Yes.

Q. And to your knowledge was the gun found?

A. No.

Q. Were you released after that traffic stop?

A. Yes.

Q. Where did you go after the traffic stop?

A. I went home.

Q. Did Justus and Ronald Joseph go with you?

A. Yeah. A bit short – after everyone left.

Q. When you got back to your house, I ask you now, did you see the gun?

A. No. [78]

Q. Again, I'm going to take you back to this interview with detectives on September 5th of 2007. You told the detectives on September 5th, 2007, that Justus took the gun out of the car. Do you recall making that statement?

A. He went back to the car for something. I don't know what.

Q. You told the detectives he took a gun out of the car: do you recall –

A. I don't remember saying that.

Q. Let me ask you this just in general, if you did, in fact, make these statements that we've talked about, was your memory better today or was it better September 5th of 2007?

A. Probably back then. I was very much trying to buy this and move on and forget it and act like it never happened.

Q. Ms. Perez, at the time you drove to Elton Park for the drug deal did you know there was a gun in your car?

A. No.

Q. But you did know that the deal was for a pound of marijuana?

A. I know it was for marijuana. I didn't know how much.

Q. And you believed that Justus had the marijuana in the back seat with him. Did you actually see that marijuana that he had?

A. No. It was covered.

Q. And you've admitted here today your role as a middleman [79] between Ricardo Gonzales and Justus?

A. Yes.

Q. And did you initially admit that to the Tooele Police Department, initially?

A. Yes.

Q. In fact, as we talked about it, you were interviewed on three separate dates, the first date was August 27th of 2007, and in that interview you denied all involvement. You even denied there was a drug deal; do you recall that:

A. Yes.

Q. August 28th of 2007 you were taken into custody and you did make some admissions on that date, do you recall that?

MR. GREGERSEN: I object – objection to the characterization. I'm concerned that by saying are you – you agree you made these admissions, that it's in essence asking her about whether her entire testimony is true and so it's a compound question.

THE COURT: What is it you really want to ask her about?

MS. TRAVIS:

Q. Well, on August 28th, 2007, you made additional statements to the police that you hadn't told them the day before, is fair to say?

A. Yeah.

Q. And then, again, we have a third interview on September 5th of 2007 and you tell, again, additional [80] information you had not told them previously, is that a fair statement?

A. Yes.

Q. So you told different version of what happened.

A. Why? Why did you tell different versions? Why did you lie to the police at any time?

A. I was scared what would happen.

Q. You were scared for yourself?

A. Yeah.

Q. You were afraid of being charge?

A. Of many different things. You know, where my life was going and being charged, you know. The

involvement, you know, I don't – you know, I don't know any of – either of the parties and so I was, you know, trying to protect myself and you know, I guess stay as much out of it as I possibly could.

* * *

[82] **CROSS-EXAMINATION**

BY MR. GREGERSON:

* * *

[83] Q. And do you remember being interviewed on August 27, which was the day after the gunfire at the park?

A. Yes.

Q. Do you recall telling the detectives, "I didn't see who had the gun, honestly"? [84]

A. I really don't remember but I probably did say that.

Q. As of August 2007 you were dating Tracy Joseph, correct?

A. Yes.

Q. And you mentioned that Ronald Joseph is the nephew of Tracy Joseph?

A. Yes.

Q. And as of these events in the park, you knew that Ronald Joseph was the nephew of Tracy, correct?

A. Yes.

* * *

MR. GREGERSEN:

Q. How long have you known Ronald Joseph? [85]

A. I wouldn't really say I know him. I met him through Tracy.

Q. When did you first meet him?

A. Probably a few months, maybe to half a year before the incident.

Q. Between a few months and a half a year prior to this event of August 26th, 2007?

A. Yeah.

* * *

APPENDIX Q

[Trial Transcript – December 14, 2010]

[86] **RONALD JOSEPH**

* * *

THE CLERK: * * * Please state your name and spell it for the record.

THE WITNESS: Ronald Eugene Joseph R-O-N-A-L-D, E-U-G-E-N-E, J-O-S-E-P-H.

THE CLERK: Thank you.

* * *

DIRECT EXAMINATION

* * *

[88] Q. Why had the three of you gone to Elton Park:

A. To make a transaction.

A. Apparently – well, drugs.

Q. And do you know what kind of drugs?

A. Marijuana.

Q. Did you know the quantity?

A. I don't know the quantity.

Q. Do did the marijuana belong to you?

A. No.

Q. Who did it belong to?

A. Justus.

Q. How do you know that?

A. Because they came with it. I didn't have it. They came with it.

Q. And when you say "they," who are you talking about?

A. I mean him when I say that.

Q. Pardon?

A. Him, he came with it.

Q. Are you familiar with marijuana?

A. Yeah, I'm familiar with it.

Q. And did you see the pound – or, excuse me, did you see the marijuana that you're talking about that Justus Rosemond had?

A. Yeah, I seen it. [89]

Q. Based on your familiarity with marijuana, do you believe that what you saw was actually, in fact, marijuana?

A. I know it was marijuana.

Q. How do you know?

A. Because I smoked it before.

Q. Do you know where Mr. Rosemond got the marijuana from?

A. No, I don't.

Q. Now, do you know where Mr. Rosemond is from?

A. As far as I know from Texas.

Q. How do you know him?

A. I don't know him. I know his brother. I know of his brother because his brother grew up with my uncle.

Q. And who's your uncle?

A. Tracy Joseph.

Q. And where does Tracy Joseph live?

A. North Carolina.

Q. Where did he live on August 26th, 2007?

A. In Utah.

Q. And did he know Vash?

A. Yeah.

Q. And when you said Justus Rosemond had a brother – when you saw Justus Rosemond on August 26th, 2007, before the three of you went to Elton Park, did you see his brother?

A. Yeah.

Q. And what was his brother's name again? [90]

A. Mackey, that's all I know.

Q. Mackey. Did you know him previously, the brother?

A. Growing up with my uncle he used to come by the house, you know, and used to chill, but other than that I don't know him.

Q. Okay. So he, Mackey, used to come by Ronald Joseph's house?

A. Yeah. When my uncle stayed with my grandmother he came – he came by there. He came to visit briefly, you know, they were friends, they went to school together, you know, they chilled together.

Q. Was that in Tooele, Utah, or somewhere else?

A. No, that was in Texas.

Q. In Texas.

A. Yeah.

Q. So your uncle, Ronald Joseph, you had met Mackey Rosemond through him in Texas?

A. Yeah.

Q. Now, on August 26th, 2007, prior to going to Elton Park when you saw Mackey, you saw Justus, were they living in Utah at that time, do you know?

A. No, they weren't living in Utah.

Q. Had they come from somewhere?

A. They came from somewhere. I don't know where they came from, but they don't live – they weren't, you know, living in [91] Utah, not from here.

Q. All right. Let's go back to Elton Park. When you first arrived at the park with Vash and Justus Rosemond, did you see anyone else in the park?

A. Not at first. But because when – we didn't see nobody else. We went up there to meet – meet the guy, whoever he was, and he came – he came like a couple minutes later. He didn't come immediately right then when we pulled up to the park.

Q. So somebody came a couple of minutes later?

A. Yeah.

Q. And do you recall if Vashti indicated or Vash indicated that that was the person that you were supposed to be meeting?

A. I can't remember like – I can't remember like that. I just know Vash knew the guy and she's the one that introduced us to the guy, so.

Q. So did she introduce this guy who came up to the car to you?

A. Yeah. She introduced us – we didn't know him. I never been to Tooele and they never been to Utah before so we didn't – we don't know who he was, she introduced us to him.

Q. Do you remember where that introduction occurred? Were you inside the car when that instruction occurred?

A. Yeah, I was in the car. [92]

Q. So do you recall you were interviewed by the Tooele detectives on August 29th of 2007; do you recall that they interviewed you then?

A. Yeah, I recall that.

Q. And do you recall in that interview that your recollection at that time was that you had actually got out of the car and shook hands with the person or people who had come?

A. I might have did that, I don't remember. I can't remember everything I did. That was over three years ago.

Q. Well, would your memory on that date be better than it is today?

A. It probably would have been better on that day.

Q. All right. So you arrived, was it light or dark outside? Do you recall the time of day?

A. It was dark.

Q. And what happened after you arrived at Elton Park and this person came up?

A. We was chilling and he was, like, Let me see the product, and Justus showed him what – he looked, I guess Justus – Justus game it to him, he

looked at it, checked it out and when he did that, he stole off on Justus.

Q. He did what?

A. He punched Jus- – punched Justus – he punched Justus. He just turned around and caught him like that (indicating) [93] and took off running.

Q. Okay.

A. It – it really wasn't no talking, wasn't too much conversation. It was just business. We was trying to get that and go. And then he just came in there, he punched him and tried to take off.

Q. So where was Justus when he got punched?

A. In the back seat.

Q. And Justus had the marijuana?

A. Yeah, he had it.

Q. What happened to the marijuana when Justus got punched?

A. He – other guy took it, took it and took off running.

Q. And where were you sitting when all of this happened in the car?

A. I think I'm – I'm thinking I'm on the left side, on the left side in the back seat.

Q. With Justus?

A. I think so. With Justus and – Justus and – whatever the other guy's name is.

Q. Just the guy who stole the marijuana?

A. Yeah. Yeah. So I think so in the back. Yeah. Boy jumped up, he just caught Justus, and took off.

That's what I remember, I can't remember everything that happened.

Q. Where was Vash at the time?

A. Vash was in the front. [94]

Q. Was she in the passenger seat or the driver's seat?

A. She was in the driver's seat. She drove us to the park.

Q. So this guy comes to the car, and you said they talked?

A. Uh-huh.

Q. He punches Justus, what happened then?

A. Justus pulled – popped off a couple of rounds.

Q. Did he do it sitting in the car?

A. He got up. He wasn't sitting – he had to get up and get out.

Q. So he got out of the car. What side of the car did he get out of?

A. I'm assuming the right side.

Q. Did he get out of the car on the side?

A. He got out of the car where, oh, boy – I think – I can't – I think Justus was next to me, he was right beside me and – and the dude came in the car and sat beside Justus and stole it from him.

Q. So did Justus get out of the same side of the car that –

A. The same side – the same side of the car that the guy that robbed him.

Q. So whichever side that guy got out –

A. Justus got out on, yeah.

Q. And he – you said he pulled out a gun and he started shooting?

A. Yeah. [95]

Q. What did you do?

I jumped out the way.

Q. Did you get out of the car?

A. Yeah. I got out of the car.

Q. Could you tell who Justus was shooting at?

A. The guy that robbed him.

Q. So the guy with the marijuana, he was shooting at him?

A. Yeah, wasn't nobody else there but him.

Q. Do you remember another guy that was with – two guys?

A. I don't remember nobody else that was there. There was just one guy, that was it.

Q. Let me ask you this about the shooting. Did Justus begin shooting immediately after – as soon as he could begin after that marijuana was taken?

A. Yeah, he had to catch himself kind of because the dude stole off on him, it was kind of like blind-sided, he wasn't expecting – nobody was expecting nothing like that to happen. He just came up there and did that. He had to catch himself and then reacted.

Q. And you jumped out of the car – did you jump out of the car when the –

A. We –

Q. Let me ask you – Mr. Joseph, let me ask you the question.

A. Yeah. [96]

Q. Did you jump out of the car as soon as the punch came and the marijuana got stolen?

A. Not as soon as, no, because it – it just happened quick. So I didn't react like that, you know, and the dude took off running and I was like, oh, no.

Q. But you did jump out of the car?

A. Yeah, I got out the car.

Q. And Mr. Rosemond got out of the car?

A. Yeah.

Q. So you indicated that Mr. Rosemond fired the gun. Do you remember how many shots you heard?

A. I just heard a couple of rounds. I don't remember exactly. Wasn't counting because I wasn't expecting it to happen.

Q. Prior to the shots being fired, did you know Mr. Rosemond had a gun?

A. No.

Q. After the shooting stopped, what did you do?

A. We got back in the car and took off.

Q. When you got back in the car after the shooting, where were you sitting?

A. I was in the back seat.

Q. Well, let me ask you this. Were you stopped soon after by the highway patrol? [97]

A. Yes.

Q. And if there was a videotape of that stop and it shows you sitting in the front seat, would that be more accurate than your statement here today?

A. Say again now.

Q. Well, what – well, let me ask you this. I apologize. You were in the back seat now you – you had been in the back seat before?

A. Uh-huh.

Q. Your recollection was you had been on one side of Justus. What I want to ask you is were you in the same place in the back seat?

A. Yeah. I was in the same place in the back seat.

Q. So ou were sitting down in the back seat, were you behind the driver or were you –

A. Behind the driver.

Q. Behind the driver. Where was Justus sitting?

A. The front seat.

Q. When you left?

A. The front seat.

Q. Driver?

A. Passenger.

Q. Who was driving?

A. Vash.

Q. So at that point where did you go?

A. We took off in a – we – we trying to see where they [98] were, I guess, you know, we were trying to find out where they were, what route they took, and we got on Main Street and that's when they pulled us.

Q. Now, did you see what direction the guy who stole the marijuana, what direction he ran?

A. He took off toward the – toward the – I guess, the tennis court or something. He went from – toward – he went to the right, somewhere back in – because he parked on the other side so I don't know exactly where he was. I just seen the lights – I just seen the lights on the car and they took off.

Q. And did you then – then you went down that street?

A. Yeah. Just on – just Main Street, they went some other way, and we just came out right there and went down Main Street.

Q. Okay. So at some point were you then stopped by the Utah Highway Patrol:

A. Yeah, they stopped us.

Q. How soon after you left the park were you stopped?

A. Maybe like five, ten minutes.

Q. Was it that soon or was it just several blocks away?

A About that soon. It was that soon. It didn't take that long.

Q. Were you driving quickly, do you recall?

A. Yeah. [99]

Q. So when these trooper overheads came on, did Justus Rosemond reach to that?

A. Yeah, he reacted. He knew what was up – we knew what was up before they pulled us, we knew when they come behind us we knew they were pulling, going to pull us so.

Q. Did he say anything?

A. He just kind of get me to stash his gun.

Q. So he tried to give you the gun?

A. Yeah, he tried.

Q. What, did you say anything to him?

A. I'm not touching it.

Q. So you told him you wouldn't touch the gun?

A. Yeah.

Q. When you wouldn't touch that gun, what, if anything, did Justus Rosemond do?

A. He – he hid it, concealed it.

Q. How did he do that?

A. Put it under the seat.

Q. which seat?

A. The back seat

Q. Okay. So your testimony is he's in the front passenger seat?

A. Uh-huh.

Q. You're in the back seat behind the driver?

A. Uh-huh. [100]

Q. And he put it under the back seat?

A. Yeah, Put it under the back seat.

Q. So did he turn and do that?

A. He turned around and put it under the back seat.

Q. And is that a bucket seat you were sitting in the front?

A. Just a regular car seat as far as I know.

* * *

[104] **CROSS-EXAMINATION**

BY MR. GREGERSEN:

Q So when the shooting started, you got out of which side of the car?

A. The left side.

Q. And so is that the driver's side?

A. The driver's side.

Q. And then afterward were you in a hurry to leave the park?

A. Yeah.

Q. And what side of the car are you saying that you got back into?

A. The same side.

Q. On the left side?

A. Yeah.

* * *

[106] Q. When you were pulled over by the highway patrol trooper, did you have your identification with you?

A. No, I didn't.

Q. You had chosen not to bring it with you to the park?

A. I never kept it on me.

Q. You've been convicted of felonies before, correct?

A. Yes, I have. One felony, not felonies.

Q. Excuse me. And that's for burglary of a habitation in Texas; is that right?

A Yes, it is. [107]

Q. And you've also been convicted of providing false information as a misdemeanor, correct?

A. Yes.

Q. And that was also in Texas?

A. Yes, it was.

* * *

APPENDIX R

[Trial Transcript – December 14, 2010]

[113] **ROGER NIESPOREK**

* * *

THE CLERK: Thank you. Please take the witness stand.

Please state your name and spell it for the record.

THE WITNESS: Roger Niesporek, R-O-G-E-R, [114] N-I-E-S-P-O-R-E-K.

DIRECT EXAMINATION

BY MS. TRAVIS:

* * *

[118] Q. I'm going to show you what's been marked for identification as Government's Exhibit 22. I'll ask if you recognize that document.

A. Yes, I do.

Q. What is it?

A. It is a written statement by Vashti Perez.

Q. And is it signed?

A. Yes, it is.

Q. And is it dated?

A. Yes, it is.

Q. What is the date?

A. September 5th of '07.

Q. And is that the written statement you took from Vashti Perez on that date?

A. Looks like a copy of it, yes.

MR. TRAVIS: Your Honor, we would move for the admission of Government's Exhibit 22.

MR. GREGERSEN: No objection.

THE COURT: 22 is received.

(Government's Exhibit No. 22 was received into evidence).

MS. TRAVIS:

Q. Now, in that statement as well as the interview, was that the last thing she did, was write that statement, you interviewed her before she wrote the statement?

A. Yes. [119]

Q. Did she discuss or tell you who had fired the shots at Elton Park?

A. Yes, she did.

Q. What did she tell you?

A. She told us that Justus Rosemond had fired the shots at Elton Park.

Q. And if she had just known him as Justus, would that have been what she said?

THE WITNESS: Yeah.

MR. GREGERSEN: Objection. Leading.

MS. TRAVIS: Just trying to clarify, Your Honor.

THE COURT: Overruled.

MS. TRAVIS:

Q. Did she also talk to you about what happened to the gun, whether the gun was in the car when they were stopped?

A. Yes, she did.

Q. What did she tell you?

A. She said the gun had been hidden before the stop.

Q. And did she tell you who hid the gun?

A. Justus.

Q. Did she also talk to you about after the traffic stop that they went to her apartment?

A. Yes, she did.

Q. And did she indicate anyone – if she saw the gun at that point? [120]

A. She said that – she never claimed to have to seen the gun. I believe she said that she kept denying that she ever saw the gun but she said that she knew the gun had been removed from her car after getting to her apartment.

Q. And did she know who had removed the gun from her car?

A. She said she knew that Justus – Justus had removed the gun.

Q. I'm also going to ask you about the interview in August on August 28th, and that was at the police station and, in fact, in that interview she had been taken into custody?

A. That's correct.

Q. And why had you taken her into custody?

A. Because she was involved in the shooting and she was basically obstructing our investigation.

Q. And during that interview, did she recall any conversation in the car after the shooting about the gun?

A. Yes.

Q. What did she say?

A. She said that when they were getting pulled over, the two people in the car, Justus and – Justus Rosemond and – I just forgot his name.

Q. Ronald Joseph.

A. – Ronald Joseph were scrambling around and she heard one of the say, "I'm not going to touch the gun" or something to that effect, he's not touching the gun. [121]

Q. And she didn't identify who said that?

A. At that time, no.

MS. TRAVIS: Your Honor, may I have one moment?

THE COURT: You may.

MS. TRAVIS: Nothing further at this time.

THE COURT: Thank you.

Mr. Gregersen, you may cross-examine.

CROSS-EXAMINATION

BY MR. GREGERSEN:

Q. Did you find Vashti Perez to be a truthful person?

A. She had several stories to tell. We had to really pry to get any information from her.

Q. It's true, is it not, that she was the type of person in interviews who could talk to you for hours and never tell you the truth, correct?

A. Yes.

* * *

APPENDIX S

[Trial Transcript – December 14, 2010]

[124] HOWARD KONG

* * *

THE CLERK: Thank you. Please take the witness stand.

Please state your name and spell it for the record.

THE WITNESS: Howard H. Kong, last name spelled K-O-N-G, first name H-O-W-A-R-D.

DIRECT EXAMINATION

* * *

[147] Q. So did you come to a conclusion regarding the cases in this case of whether or not they had been fired from the same firearm –

A. Yes.

Q. —based on that?

A. Yes, based on what I saw on the bridge face and the firing-pin impression, my conclusion was that they were fired from the same gun.

* * *

APPENDIX T

[Trial Transcript – December 14, 2010]

[171] MS TRAVIS: Could I possibly – so we can expedite that, give the court citation to two 10th Circuit cases. As I looked through these I only had – there was one instruction I wanted to bring to the Court's attention, it's the Bowen case at 527 F.3rd 1065.

THE COURT: 57 F.3rd what?

MS. TRAVIS: 1065.

THE COURT: What instruction does that relate to:

MS. TRAVIS: It is aiding and abetting, 94C, and our position would be what you have here is not 10th Circuit Utah law, that is another – that is the 10th Circuit law on that exact issue. There is another case law of Vallejo case, which is 421 F.3rd 1119.

THE COURT: What does that relate to?

MS. TRAVIS: Same, Judge, both on the same issue.

MR. GREGERSEN: Our argument is it, yes, that is [172] 10th Circuit rule that is not precisely the issue. It is aiding and Abetting, the 924C, where underlying crime is that violence. And our position is since both of those cases cited by the government, each say this is the rule where it is a crime of violence that it does not apply, in our opinion, when the underlying crime is drug distribution. That's why we cite cases from other circuits which state what the general rule is.

APPENDIX U

[Trial Transcript – December 14, 2010]

[Jury Instruction Conference]

* * *

[15] THE COURT: Thirty-seven. Now, this is the one we were quarrelling about.

MS. TRAVIS: Yeah. This is the one that we objected to.

MR. GREGERSEN: Yeah. And I think that it is fine as it is.

THE COURT: And we've –

THE CLERK: The second page.

THE COURT: We've taken a look at the law and we think Ms. Travis is right about those 10[th] Circuit opinions even in circumstance. Did you want to make any more of a record on it?

MR. GREGERSEN: I do. I think this is a crucial issue.

THE COURT: I don't dispute that. I think it is an important – at least an important issue.

MR. GREGERSEN: These two cases, U.S. versus Bowen [16] and U.S. versus Vallego, V-A-L-L-E-G-O, the government is correct that they deal with a – the government would say it's the identical situation and my point of view is that it's not. That in each of these cases, even though the 10th Circuit was dealing with 924(c), and even though it had to do with aiding and abetting the use of a gun, the 10th Circuit was careful to point out it was stating what the rule was

when the underlying felony was a crime of violence and that's not what we have here.

We have the underlying crime of drug trafficking and the 10th Circuit has acknowledged that as to this issue, it's like it's out on a limb by itself away from the other circuits. And so I would argue that this rule, where it's different than the other circuits, the language should be limited to just what it says and that this aiding and abetting should only apply to the language that has to do with the underlying crime of violence.

THE COURT: Ms. Travis or Ms. Fojtik.

MS. TRAVIS: Well, our position would be that the statute, 924 (c), is in place when you have a crime of violence or a drug-trafficking crime. We have been unable to locate any case whatsoever discussion the elements of a 924(c) or how we interpret a 924(c) that makes a difference between drug trafficking and a crime of violence. There is no distinction.

It's one or the other. There should be no [17] difference in the application. There's no logical reason for a difference in the application. The 10th Circuit certainly didn't say, Oh, we're saying this for a crime of violence, but we don't mean it for a drug-trafficking crime.

And I also think Mr. Gregersen says the 10th Circuit's out on a limb, they really aren't. There's been a few circuits that have addressed this and it's also a Pinkerton liability sort of concept and it's the 10th Circuit said and there's no reason to make a difference between the two.

THE COURT: Anything else?

MR GREGERSEN: If I can respond.

THE COURT: Sure.

MR. GREGERSEN: The 10th Circuit explicitly did not say, Oh, this applies to all nine – aiding and abetting and all 924(c)s. For whatever reason they said, this is the rule when the underlying crime is a felony of violence and they did not go so far as to say when they easily could have that this is the rule that applies to aiding and abetting in all 924(c)s.

THE COURT: It's not a bad argument. I agree with the government. So I'm going to do it as though these cases apply in this case. If I'm wrong, you got a great issue for appeal and it's their fault.

* * *

APPENDIX V

[Trial Transcript – December 15, 2010]

[Closing Arguments]

* * *

[3] THE COURT: We will now proceed with closing arguments. Ms. Travis, you may proceed with the closing arguments for the United States.

MR. TRAVIS: Thank you, Your Honor.

Ladies and gentlemen, you've now heard the evidence in this case, and it's time for you to assess that evidence in order to determine whether the United States of America has proven beyond a reasonable doubt that Justus Rosemond committed the crimes alleged in the superseding indictment.

Now, in her opening statement Ms. Fojtek told you that this case was about a shooting in Elton Park in the evening on August 26th, 2007. The case is about who did the shooting and why. With regards to the question of who, it is the government's contention that the evidence establishes beyond a reasonable doubt that it was the defendant Justus Rosemond who fired at least seven rounds from a 9 millimeter semi-automatic handgun the evening of August 26th, 2007. And why? Well, the evidence also establishes beyond a reasonable doubt that the gun was fired when Ricardo Gonzales stole the marijuana that Mr. Rosemond had brought to the park to sell.

So what is the government's evidence? Well, first I should explain that the government's evidence in connection with Count One segues into Count Two because as you will [4] see in the special verdict form

when you go back, you cannot convict Mr. Rosemond of Count Two unless you first find him guilty of Count One. And Judge Kimball explained that to you in the instructions.

If you find that the government has met its burden of proof in Count One, you will then proceed to determine whether each element of Count Two has been proven beyond a reasonable doubt. And as you look at Count One, I would submit to you that we have established the elements of that crime beyond a reasonable doubt. How have we done that?

Well, in Count One, as Judge Kimball told you, the government must show that Justus Rosemond knowingly possessed a controlled substance and that the possession was with the specific intent to distribute the controlled substance. So what is our evidence that proves Count One beyond a reasonable doubt?

Well, on that issue, we have testimony from Coby Painter, Ricardo Gonzales, Vashti Perez and Ronald Joseph. Now, there's no dispute that these four are not model citizens. All four of them were admittedly involved in drug trafficking, and all are admitted marijuana users and convicted felons. But as one of my colleagues is fond of saying, if you want to know what really happens in hell, you don't ask an angel.

They obviously have knowledge of what happened that [5] night. But why should you give their testimonies any credibility? Why should you believe them?

Well, first of all, all four of these witnesses admitted against their own interests that they were at Elton Park on the evening of August 26, 2007, for a drug deal. Cody Painter and Ricardo Gonzales went

even further and admitted that that night they committed a robbery. Second, the four witnesses, their testimonies on this issue are consistent. You will recall Vashti Perez admitted that she was the middleman in the deal. And she testified that it was – that she knew him as Justus, but Justus Rosemond was the intended seller. Cody Painter also testified that Vashti Perez set up this deal. And, in fact, he testified that Vashti Perez told him that she had two guys from Texas who wanted to get rid of some marijuana. Coby also testified that Vashti described the marijuana to him as what she called chronic or higher grade, and that the two guys were only asking $800 for a pound. [6]

Now, Ricardo Gonzales testified similarly. He told you that Vashti Perez told him that she had a couple of buddies who had some marijuana for sale, and she wanted Ricardo to come to Elton Park to check out the marijuana. Ricardo also said that Vashti claimed that the marijuana was chronic, but he remembered the price was somewhere between 500 and $600 a pound.

Now, Coby Painter and Ricardo Gonzales also established that what they stole on the evening of August 26, 2007, was, in fact, marijuana. They both testified they were familiar with marijuana. They knew the drugs were marijuana. They even split up the pound of marijuana between themselves after the robbery.

What about Ronald Joseph? What did he say about this? Well, you'll recall that he testified he was familiar with marijuana, that he smoked marijuana and that Justus Rosemond did, in fact, bring marijuana to Elton Park. Ronald Joseph also testified

that he didn't know where Justus Rosemond had gotten the marijuana, but that Justus Rosemond and his brother had come up from Texas.

So I would submit to you, therefore, that the two guys who had come up from Texas and had the marijuana were Justus Rosemond and his brother. Ronald Joseph was not part of that ownership. He was working his drug business out of Layton, and he told you that. And it was clear he'd been living in Layton for at least several months because Vashti Perez had known him that long. And Vashti Perez didn't testify that Ronald Joseph had come up from Texas or that he owned the marijuana. In fact, as I've already stated, she stated merely that the marijuana belonged to Justus, not Justus and Ronald.

Now, you will recall that the defense challenged [7] Vashti Perez about her truthfulness regarding the marijuana deal and Justus Rosemond's role in that deal, implying she may have lied because of the agreement she had entered into with the United States. But as you consider Vashti Perez's testimony on this issue, I would ask you to first recall that the evidence shows that Vashti Perez made the same admissions about her involvement to law enforcement three years before she ever received immunity from the federal government. And when you're deciding this issue, I would also ask you to remember that Vashti Perez's testimony that the marijuana belonged to Justus Rosemond was consistent with what she told Coby Painter before that deal ever went down. She told Coby Painter she had, quote, two guys from Texas who had some marijuana they wanted to get rid of. She would have had no motive whatsoever to

lie to Coby Painter at that point in time about who the marijuana belonged to.

And again, as I've already stated, it was Justus Rosemond and his brother who had come up from Texas. It wasn't Ronald Joseph. He was living here. And it wasn't Tracy Joseph because the evidence was at that time he was also living in Utah.

I would also submit to you that the evidence of a shooting which will be discussed in greater detail in connection with Count Two can be used by you to establish that there was, in fact, a transaction for illegal narcotics going [8] on the night of August 26, 2007. The shooting started when the merchandise was stolen. Would that have happened if Ricardo Gonzales hadn't been stealing drugs? It's certainly evidence of a narcotics transaction.

With that fact in mind and in consideration of the testimony of Vashti Perez corroborated, corroborated by Coby Painter, Ricardo Gonzales and Ronald Joseph, I would submit to you that the government has established beyond a reasonable doubt that Justus Rosemond took a pound of marijuana to Elton Park the evening of August 26, 2007, with the intent to sell those drugs to Ricardo Gonzales or Coby Painter. So based on that evidence, I would ask you to find Justus Rosemond guilty of Count One of the superseding indictment.

Now, if you do as we've mentioned and as Judge Kimball instructed you, if you do render a verdict of guilty on Count One, you will then move on to Count Two where the government has alleged that during and in relation to the marijuana trafficking charge, Mr. Rosemond used, carried, brandished or discharged a firearm. Now, you may know in the

superseding indictment that the charge actually reads, quote, used, carried, brandished and discharged. Even though it reads that way in the superseding indictment, as Judge Kimball has instructed you, the government can prove any or all of those particular allegations. And even though that's the law [9] that we can prove it in, they say, the disjunctive of "or," I would submit to you that the evidence here establishes beyond a reasonable doubt that Mr. Rosemond did, in fact, use, carry, brandish and discharge a firearm during and in relation to his possession of marijuana.

So what is the evidence of that crime? What evidence has the government submitted to you? Well, first of all, we have undisputed evidence that a gun was fired in Elton Park the night of August 26, 2007.

If you could pull up Exhibit 1.

Now, you will recall the testimonies of Chelsie Lopez and Kala Hamilton, and they testified that they were in this area. They were hanging out sitting on top of a slide. And as they said, they got a good view of the parking lot. And this is where in the north part of the parking lot just west of the bathroom that a car pulled in. They saw the car in the lot, and they heard someone shooting. They heard a number of rounds, and they called 911.

You also heard the testimonies of Terry Morrill and Darrell Waters. And they were – this is a vacant lot now, but they were sitting on their front porch at 391 North Broadway when they heard a number of shots. And they saw a guy running in a zig-zag fashion as they've described from the parking lot here in a northwesterly fashion through the trees towards Broadway. In fact, they described it as he was [10]

running in a zig-zag pattern north of the trees – or north of the tennis courts through the trees. And you'll recall their testimonies that they heard bullets hit the trees. And Darrell Waters told you he thought one or two of the bullets were maybe 10 or 15 feet away from where they were.

Then patrol Officer Chris Thompson, who is now a detective of the Tooele police department, he testified that he responded to Elton Park. And after talking to Chelsie Lopez and Kala Hamilton, he located seven shell casings on the ground in the parking lot. And as I'm indicating here, he indicated in this particular area, again, west of the bathroom, a little south of the bathroom in the parking lot, he marked those casings, and he showed them to Detective James May, who placed the casings into evidence.

Exhibit 17, please.

At the same time, the 911 calls coming into the Tooele Police Department, we know from the testimony of former officer Becky Bracken that an unknown citizen was stopped for a light in this area of 400 North and Main Street when he heard a bullet whizzing by him. Now, this Exhibit 17 is the trajectory of just one of the bullets. And this is based on the firing point here in the parking lot to, you'll recall, Mr. Hammond's residence where a 9 millimeter slug was found a day and a half after this shooting on his front porch.

So we had shell casings on the ground in the park. [11] We have bullets flying in a northwesterly direction.

Now, Howard Kong, a firearm and toolmark examiner with ATF, also told you that the seven shell casings found by Detective Thompson were all 9

millimeter in size and were all fired from the same gun. And the high degree of probability on that gun was that it was a Glock or Smith and Wesson Sigma series. And we also know from Howard Kong's testimony that the bullet found by Mr. Hammond was, in fact, a 9 millimeter which could have been fired from a Glock.

So I submit to you that there is absolutely no doubt that a gun was fired in Elton Park the evening of August 26, 2007. And I would submit there's no doubt that the bullets were aimed at Ricardo Gonzales, who has admitted he was fleeing with the marijuana. The evidence shows that Ricardo Gonzales and Coby Painter certainly didn't have a gun. Ricardo was running in a zig-zag pattern as bullets were flying by him. He told you that, and Terry Morrill and Darrell Waters told you that. They saw independently a man running in a zig-zag pattern. And Coby Painter told you he ran so hard he ran out of his tennis shoes. And those shoes were recovered.

Again Exhibit 1.

Those shoes were recovered in this area.

Coby Painter was running away. He wasn't shooting.

Well, what evidence does the government have that [12] Justus Rosemond fired the gun? Now, in looking at that question, I would expect the defense will ask you to focus on the conflicting evidence, which has come in about who Ricardo Gonzales hit right before he stole the marijuana and ran. And the government will concede that there is conflicting evidence on that point. Both Vashti Perez and Ronald Joseph testified that Justus Rosemond was sitting in

the back seat, and Justus Rosemond was the person that Ricardo Gonzales hit. Ronald Joseph, however, testified that he thought he was in the back seat with Justus Rosemond.

Exhibit 20.

Although as you can see from a back seat of a 1996 Mazda Protege, really it's high unlikely that three grown men were all sitting in that back seat. Ronald Joseph simply could be mistaken.

And we know from both the testimony of Coby Painter and Ricardo Gonzales that there were two male blacks in the car with Vashti Perez. But Coby and Ricardo both testified that one of the men was sitting in the front passenger seat, and one was in the back seat at the time the drug deal took place. Coby Painter also said that Ricardo Gonzales hit a guy who was wearing glasses. You'll remember Coby said he was there standing by the door looking in, Ricardo hit the guy with the glasses. And as Trooper Croft pointed out in the video, the guy with the glasses is the defendant [13] Justus Rosemond. But Ricardo Gonzales said he thought he hit the guy in the Peyton Manning jersey, who we also know in the video is Ronald Joseph.

So who was it that Ricardo Gonzales hit? Were the witnesses lying here? Well, the fact is three years passed since the incident occurred. Memories fade and they change, so who was sitting where in Vashti Perez's car may never be determined with 100-percent accuracy.

But taking all of the testimony as a whole, I will submit to you that simply Ricardo Gonzales got a couple of facts wrong. He made a mistake about Peyton Manning jersey. At the time he was sitting in

the back seat, he testified he was planning a robbery. He testified he was looking at the marijuana. He spent a lot of time looking at the marijuana. He looked in the rearview mirror at Ashley Perez.

And Exhibit 19.

And we would submit that when he saw the number 18 on someone's jersey, that it very well could have been whoever was sitting in this front seat because the bucket seats are here. So it's equally plausible that the jersey was being worn by the individual in this front passenger seat. As he punches, he grabs the marijuana. He turns, there is that Number 18.

And Ricardo Gonzales' memory was faulty on another Coby Painter – Exhibit 1, please – [14] Coby Painter stayed here during the deal. He said he was right here by the tennis courts, and that Ricardo was at the car, inside the car. And we know he simply is mistaken on that point. First of all, we know because Coby said, I was at the door. But where were the tennis shoes found? They were here. Had Coby Painter been standing here and had when Ricardo Gonzales began to run, Coby Painter would have run along those tennis courts to Broadway. He didn't. He was at that car, and he ran away from Ricardo, and he ran this way, south along those tennis courts, and he ran out of his tennis shoes.

Now, Coby Painter on the other hand, our position would be that he was not as stressed out. His memory, in fact, on this point may be a little better than Ricardo Gonzales because he wasn't the one that was going to grab the marijuana and run, and he wasn't the one who ultimately was shot at. His stress level may well have been significantly less than that

of Ricardo Gonzales. And as I say, Coby Painter said, the guy in the back seat that Ricardo hit was a guy with the glasses.

But ultimately, and I feel like I have digressed at some point. I would argue that it doesn't really matter who was hit by Ricardo Gonzales, because ask yourselves, who had the motive to bring a gun to the deal, and who had the motive to shoot when the marijuana was grabbed? And the answer to [15] that question is that Justus Rosemond had the motive. Why? Because the marijuana belonged to him. He was the one being robbed of his property.

Justus Rosemond was selling marijuana to strangers. Vashti Paris told you she didn't know him very well. We know nobody really knew other than Vashti Ricardo Gonzales or Coby Painter very well. So Justus Rosemond had a motive to bring a gun to the deal to protect his property. And when Ricardo Gonzales grabbed the marijuana and ran, Justus Rosemond had the motive to stop him. Justus Rosemond wanted his valuable property back, so he pulled out that gun and he began firing. And he fired at least seven rounds at Ricardo Gonzales. No one else had the motive to react in such a drastic manner. Only Justus Rosemond.

So what other evidence is there that Justus Rosemond pulled the trigger at least seven times that night, the government would say each time endangering the lives of scores of people who lived in the line of fire of each one of those bullets?

Exhibit 17, please.

This is just one bullet that was fired. We know there were at least six others. People, this is a residential area all through here. Seven rounds were

fired. But again, back to who fired the gun. The most compelling evidence in this case of who fired the gun is Justus Rosemond himself, as [16] you see him in the videotape of the traffic stop made by Trooper Nathan Croft. What do we know about that stop?

Well, first I would submit to you that we know there was a gun in the car at the time of the stop. And how do we know that since no gun was found after the search by Trooper Croft and Officer Bracken? Well, common sense will tell you that whoever fired the gun at Elton Park held onto that gun, jumped back in the car as Vashti Perez drove them out of Elton Park. The shooter would have kept the gun. He would not have tossed the gun after the shooting. We know from the shell casings at the scene that the weapon used was a 9 millimeter semiautomatic handgun. Howard Kong told you that. That's not something anyone would just throw away. Guns are valuable. And more so, if the gun's been used in a crime, if it were found right by the crime scene, it could be traced back to the person who used it in that crime. There could be fingerprints. There could be other identifiers on the gun. It's not going to be tossed. So I would submit to you that the shooter held onto the gun, got back in the car with the gun. And that assertion is supported by the evidence in this case.

You will recall that Detective Chris Thompson testified that he and other officers thoroughly, thoroughly searched the route taken by Vashti Perez as she left the parking lot at Elton Park. [17]

The redacted 17.

Here is Elton Park. And the evidence was down – excuse me – down Birch, up Broadway to 400 North,

they searched all the way to Main Street. They went up one side, they came to Main. They turned around, and they went back the other side. And they did not find a gun. And Detective Thompson also told you that no guns had been reported found in that area since August 26th of 2007.

Now, Trooper Nathan Croft testified that after the stop and he had allowed Vashti Perez to continue, he had another trooper search along the route, and he followed the suspect vehicle after he had first seen them at Main Street. And to corroborate the fact that no gun was found in that search, which Trooper Croft told you about, you can watch the videotape. As Trooper Croft pulled – his videotape is running, and he pulls behind Ashley Perez's car. There's nothing being thrown out of that car. So I would submit to you there is no doubt that the gun was in the car when Trooper Croft stopped it.

Common sense would also tell you that the gun wasn't hidden until the stop by Trooper Croft. Why? Well, first of all, there really hadn't been much time to hide it. Chelsie Lopez and Kala Hamilton testified that the suspect's vehicle left Elton Park in a hurry, went down Birch, Broadway to Fourth North. And they said they called 911 while the [18] shots were being fired. Trooper Croft told you that he saw that car less than a minute after the attempt to locate had been broadcast.

But more importantly, again, we're back to common sense. What reason would there have been for anyone to hide the gun in the car before the traffic stop? They're on their way. They're going. It's not until those overheads go on and they see, oh, we're

being stopped by the cops, that's when the motive comes to hide the gun.

And Ronald Joseph's testimony supports that common sense conclusion. Ronald Joseph testified that when they were pulled over by Trooper Croft, at that point Justus Rosemond tried to hand him the gun to hide it. And you'll recall in the videotape Justus Rosemond is now the front seat passenger, Ronald Joseph is the back seat sitting behind Ashley Perez. Ronald Joseph said, he told Justus Rosemond, I don't want to touch the gun. So Rosemond turned to the back, and he hid the gun under the back seat of the car.

Now, we would anticipate that the defense is going to argue that Ronald Joseph lied about the gun because he was the one with the gun. The problem with that argument is Trooper Croft's videotape. That videotape is an objective piece of evidence which shows Justus Rosemond moving around inside that car in a manner completely consistent with Ronald Joseph's description of what happened and what was [19] going on in this car.

So let's talk a little bit about the video. As Trooper Croft told you, and as you will see, Justus Rosemond was right front passenger at the time of the stop. And on the video, you will see the right front passenger moving around, turning towards the back seat several times, just as Ronald Joseph described Justus Rosemond's conduct.

Trooper Croft described the movement in his testimony as what he called furtive, and he said it wasn't normal.

Exhibit 20.

And we know that the Mazda, 1996 Mazda Protege is a small car. You can look and see the distance between the front and back seats. And you can see from that photograph that it was clearly possible for Justus Rosemond to have reached back from the front seat where he was sitting through that bucket area and put the gun under the back seat just as Ronald Joseph described. As you watch the video you'll also see that Ronald Joseph doesn't move around when the stop is made and Ashley Perez doesn't move around.

Now, at one point as you watch the video, you will notice that Trooper Croft's spotlight reflects light for a while and you can't distinctly see either Ronald Joseph or Ashley Perez during that time. But despite that fact, we know what was happening inside the car at that time. Trooper Croft told you, testified that throughout this entire stop, he could [20] see everyone clearly inside that car. He saw them through the entirety of them being pulled over and his approach. And he testified that the only person moving around in that car was Justus Rosemond.

Miss Johnson, if we could just play that portion of the video we've been talking about. And to be able to see this, you may have to adjust your screen in the jury room for lighting.

(Whereupon, portions of the video was played.)

MR. TRAVIS: Now again, the lighting is something you're going to have to adjust on your screen. When you return to the jury room to deliberate, I would ask that you watch that tape carefully because that tape recording does establish conclusively that Justus Rosemond was in the right front seat at the time of the stop and that he was

moving around in a manner consistent with hiding a gun. That tape will also establish he was the one wearing glasses and that Ronald Joseph was sitting in the left rear seat at the time of the stop behind Vashti Perez, who was driving. And that videotape along with Trooper Croft's testimony will establish Ronald Joseph and Vashti Perez weren't moving around.

Justus Rosemond is the only person in this video making furtive movements.

I would submit to you that that videotape establishes beyond a reasonable doubt that Justus Rosemond was [21] hiding the 9 millimeter that had been fired at Elton Park just minutes before. And why would he be hiding the gun? Because he was the shooter. He was the shooter who fired seven rounds to protect his marijuana. He fired those seven rounds at Ricardo Gonzales. He jumped back into Vashti Perez's car. He had the gun in his possession. He held onto it until the cops showed up and pulled them over, and now he's got to hide it. And you can clearly see that final act of hiding the gun in the video.

Now, ladies and gentlemen, Judge Kimball instructed you on the various elements of what we call the 920(c) count, And we talked about what carrying a firearm means. You're instructed here using the firearm, brandishing. The term discharge simply means to shoot or fire.

I want to turn your attention to the phrase, during and in relation to the commission of a drug trafficking crime. And during and in relation to simply means that the firearm must have some purpose, role or effect with respect to the drug trafficking crime. By protecting the marijuana, the

gun had a significant purpose, role and effect in that drug trafficking crime at Elton Park.

Based on that law and the facts in this case, the government has established beyond a reasonable doubt Justus Rosemond's guilt in Count Two of the superseding indictment. Now, if you find him guilty of Count Two, you [22] must then answer the special verdict form. And that special verdict form is going to ask you whether the defendant used, carried, brandished or discharged the gun. And you're going to be asked to check all that apply. And I would submit to you that you should check all of those options because he used the gun, he carried the gun, he pulled it out and brandished it, and then he fired the gun in order to protect his marijuana.

Now, ladies and gentlemen, you are well aware from the last two days that the government's position in this case is that the evidence establishes beyond a reasonable doubt that Justus Rosemond was the shooter the night of August 26th, 2007. You heard it in the opening statement by Ms. Fojtek, and you've been listening to me argue this point.

But there is, in fact, an alternative legal theory upon which you could convict Justus Rosemond of Count Two whether you're convinced he's the shooter or not, And that alternative legal theory is called aiding and abetting. And if you consider that theory, that is Instruction 38 that Judge Kimball read to you. That instruction states that Justus Rosemond would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking crime and that Justus Rosemond knowingly and actively participated in the drug trafficking crime. So if Mr. Rosemond were to

somehow – if Mr. Gregersen were to argue [23] that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.

I would reiterate that the evidence establishes that Justus Rosemond was involved in the drug trafficking crime. He is involved with the deal with Ricardo Gonzales. He certainly knew and actively participated in that crime.

And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

Now, with regards to Counts Three and Four, the parties as you know have stipulated that at the time of the incident at Elton Park Justus Rosemond had previously been convicted of a felony, which is a crime punishable by a term of imprisonment of more than one year. And at the time of the incident at Elton Park he was an alien unlawfully and illegally in the United States.

So, therefore, the only issues before you on Counts Three and Four are whether Justus Rosemond possessed ammunition on August 26 of 2007, and whether that ammunition traveled in interstate commerce. So what is the government's evidence on these questions? Well, first you've been instructed by Judge Kimball that a cartridge case qualifies under the law as ammunition. And you heard Howard Kong talk [24] about cartridge cases and how they're the same as shell casings. It's different words that are used. And he testified that the seven items contained in Exhibit 15, those seven shell cases found in Elton

Park, he said they're all what are called cartridge cases. And the government's evidence establishing the defendant's possession of the 9 millimeter firearm is what I've already talked to you about. And we would submit our evidence establishes beyond a reasonable doubt that he had to have also possessed the cartridge cases that were inside the 9 millimeter that he possessed.

You also heard from Special Agent Kent Owens of ATF who testified that the seven cartridge cases seized in Elton Park had been manufactured in the state of Illinois. As such, those cartridge cases did, in fact, travel across state lines. And under Instruction 42 the government has proven that the cartridge cases or ammunition at some point traveled in interstate commerce.

So based on the government's evidence regarding the defendant's possession of the firearm and, therefore, his necessary possession of the cartridge cases, Howard Kong's testimony and the interstate nexus that was established by Agent Owens, I would ask you also to return a verdict of guilty on Counts Three and Four.

Ladies and gentlemen, you will now hear closing [25] argument from Mr. Gregersen. And following his argument to you, I will be given the opportunity to present a rebuttal. So I will have the opportunity to speak with you again at that time. And I thank you for your attention.

THE COURT: Thank you.

You may proceed, Mr. Gregersen.

MR. GREGERSEN: Ladies and gentlemen of the jury, this has been an interesting case. I can't

remember a case that I have considered to be based on speculation like this one has been. The government in their argument explains that there's convincing proof that Justus Rosemond owned the marijuana, that he brought it, that it was his, that that's why he had a motive to shoot the gun. And there is no proof.

The government says that common sense says that the shooter would hold onto the gun. People do all kinds of things with a gun. Human experience teaches that if you have a hot potato and it's hot, you try to get rid of it. I mean, people do all kinds of different things. I think it stretches reasonableness to assume that a person would hold onto a gun when they knew the police were chasing them.

I can't tell you, the truth is, what happened in this case. I wasn't there. I wasn't a witness. You weren't witnesses. And so we go based on the evidence that is presented to us. And in the jury instructions that the Court has read, the Court stressed over and over again by restating [26] it that to find him guilty there must be proof beyond a reasonable doubt. Now that doesn't mean there has to be proof beyond all doubt. That is, if you thought what maybe the real Justus Rosemond was abducted by aliens and it wasn't really him, maybe that wouldn't be a reasonable doubt. But if you do see that there is reasonable doubt it is your duty to acquit, to find Mr. Justus Rosemond not guilty.

And I would submit to you that in this case where he is charged with serious crimes that it's important for you to deliberate, for you to consider the evidence on both sides of this as you look and decide whether or not there is reasonable doubt. The federal

government with all its resources has put on, I lost track of how many witnesses, 15, 17, something like that, and there is doubt all over the place such that it does not firmly convince us of the defendant's guilt.

I would like to hit one point that the government raised about aiding and abetting. You know, we were here originally, and the government said, this case is about whether or not Justus Rosemond fired the gun. And I agree. Now the government tells us that the case is also about whether he was there when another person fired the gun. And I would like to stress that aiding and abetting in Instruction 38, the test is two things: whether the defendant knew that another person, a cohort used a firearm in drug [27] trafficking; and whether the defendant knowingly and actively participated in the drug trafficking crime. And I would submit to you that there is not such evidence here.

This case is just speculation. The prosecution has a logical problem that they've – a logic problem that they've raised in their argument. Yes, we have a bunch of people that were untruthful and contradictory as witnesses. The government says that it's Ricardo Gonzales that we shouldn't believe. As to whether it was Ronald Joseph in the back seat, that is what Ricardo Gonzales said that Ronald Joseph was the person in the back seat wearing the Peyton Manning jersey 18. And the government said we should disbelieve that. Well, that doesn't make sense, either, because when the car was pulled over it was Ronald Joseph that was in the back seat wearing the Peyton Manning jersey 18.

So looking at this case with different things, again, it's – as I indicated before, it's like a game of

Clue. That is, we know that there was a crime and it occurred in a park and it occurred with a gun, but we don't have proof that it was done by Justus Rosemond.

Now, each of these counts that my client is charged with would require proof of possession of something beyond a reasonable doubt. Count One requires proof beyond a reasonable doubt that he possessed marijuana. Count Two, discharge of the firearm during and in relation to a drug [28] trafficking crime, that would require that he possessed a firearm. Count Three would require proof that he possessed ammunition while a felon. And Count Four would require proof again that he possessed ammunition while not having permission for being in the country.

The duty – the thing that I ask you to do as jurors is to consider very carefully as you make your decision. And the instructions point out that a reasonable doubt is a real doubt based on reason and common sense after careful and impartial consideration of all the evidence.

As jurors, you are the judges as to the credibility of witnesses. You were able to see as these witnesses testified. You could look at them in the eye and determine their demeanor and weigh the things that they said. And you get to weigh whether you are convinced that they told the truth.

You know, I wanted to make a couple of observations. And again, I can't say that I know what happened in this case. It's interesting that there was no gun found. And the government says, well, there was no gun found and so it must have been my client that hid the gun in the car. And yet, there's evidence

by officers who searched that car that said they did a thorough search of the car and they didn't find a gun in the car. So that doesn't make sense. That's clearly not proof beyond a reasonable doubt that is [29] required in order to convict someone of a serious crime.

We have Coby Painter and Ricardo Gonzales coming up, and they come up to the car. They've explained that it was their intent to steal the drugs. Well, if we assume it was the intent of one or more people in the car to sell drugs, which is more likely the person who would bring a gun, someone who was planning to sell drugs or someone that's planning to do a strong arm robbery and steal the drugs?

So I don't know what happened, but it seems like a logical inference, logical possibility that it well could have been Coby Painter, Ricardo Gonzales who brought the weapon, who fired it to ward off people from following them after they grabbed drugs. It seems just as plausible as anything that the government is saying. It certainly would explain why after officers search the road they find no gun. After officers search my client and the other car occupants they find no gun. They do a thorough search of the car, and they find no gun. I mean, it's just as plausible that they took it and ran away with it.

The fact that when the car was pulled over my client had his identification with him and the other two occupants Ronald Joseph and Vashti Perez, they didn't have their identification. It's also a reasonable inference that this shows that the two who didn't have their identification were the ones that they knew they were going to do a drug [30] deal. And if you are going to do a drug deal, you don't have to

present your ID to prove who you are in order to sell drugs. In fact, if you get caught at a drug deal, you don't want to have your ID with you. You want to pretend you're someone else. So that would be a reasonable inference. This is a case that is built upon speculation by the government. There are so many other explanations that are reasonable about what happened. It's an interesting case where no gun was found, no drugs were found.

The government called several witnesses in this case. Government started by calling Kelsey – or Chelsie Lopez Turney. And a few witnesses after that, Officer Thompson affirmed what Ms. Turney and also what Kala Hamilton had said to him, that is, Officer Chris Thompson acknowledged that they did say what he put in his report. But interestingly, Ms. Turney denied several of those things. And, you know, Ms. Turney was asked, did you tell the officer that you saw a gold or tan colored SUV? And she said no. The officer said they did say that. Did you say that you saw another vehicle parked on Broadway for a while? She says no, where the officer said she said that. Did you say that the two or three subjects walked from the area of another car past the tennis courts? She said no. Did you say to the officer that the persons came from another vehicle and climbed into the blue car in the parking lot? No.

Yet, each of these things were ones that Officer Chris Thompson acknowledged that they had said.

I said, I take it, then, that you did not say that the persons were in the car for a few minutes. No. Did you tell the officer that you saw several people jump out of the car? No. [31]

I asked her, did you tell the officer that one male subject got out of the car on the driver's side and started shooting? She said no.

Whereas, Officer Thompson explained that on that evening when her recollection would have been fresh she said that very thing, that a male subject got out of the car on the driver's side and started shooting.

Then there was the testimony of Kala Hamilton. And similarly, it was established that she had said similar remarks to Officer Thompson.

Officer Bracken, Becky Bracken, a retired Tooele County, Tooele City police officer, testified. As you recall, she was one of the two officers that came up and searched the vehicle. And she has searched whole houses before. She's had training in searching. This search occurred near the end of her career which she started in 1989. She had training in searches. They used a flashlight, she and Officer Nathan Croft. She said they did a thorough search of this car, and yet, they found no gun. And yet, the government [32] wants you to base your conviction of my client upon some speculation that my client had a gun in the car that somehow miraculously wasn't found during a search by the officers. And that just strikes me as an incredible argument. But that's to be used as proof that a person committed a crime and is to be convicted of a serious crime.

Again, I wasn't there. I can't tell you exactly what happened. I know that my client was the only one that had ID. Whether he was reaching for ID, whether he was talking to the other occupants, I don't know. It seems as plausible to me as it does the government's explanation that, oh, that must prove that he had a gun.

There was a cartoon movie I think called "The Incredibles" where the wife could stretch and was elastic. And I'm picturing her sitting in the front seat, reaching around and putting the gun under the back seat with all of that dexterity. I mean, it strikes me as not being a reasonable inference. And certainly there's no basis. And, in fact, to say that my client reached around and hid some gun and have the dexterity to do that when we don't see him in the video like leaning – like leaning his whole body over the seat. And then when there's no gun found.

There was testimony about a person in the back seat being hit, clear testimony that there was a person that was wearing a jersey with an 18 on it. Speculation about whether [33] that person was injured or not. I don't know whether that person was injured or how hard they were hit. That evidence was entirely unclear and convoluted and contradictory that neither officers – or, that is, the officers testified that neither of them observed an injury on either of the males that were in there.

No testing for gun powder on people's hands occurred. I'm not an expert in that. I just kind of wondered why things were not done. We had testimony from Jeremy Hansen that no gun was found. Had testimony from a woman Terryl -¬or Terry Morrill, that she heard bullets. She thought the car – she didn't remember whether she told people that the car was actually silver that drove by. Then her boyfriend Darrell Waters testified that he thought the car was white that drove by.

We had David Hammond testify. And, you know, it was interesting testimony, an elderly gentleman, well meaning. He testified that the bullet he found he

thought he found in 2009, whereas we know this shooting was in 2007. Is it related? I don't know. Again, the police are saying they talked to him and maybe it was found in 2007. He indicates that his house is 3,000-and-something feet, someone testified that it was 7/10ths of a mile, about three-quarters of a mile away from the park. I think that's indication based on some other people's testimony and the trajectory and that it was [34] fired up in the air.

And again that could lead us to wonder whether maybe it was Ricardo Gonzales and Coby Painter that shot at a neighbor, just trying to ward off people, I don't know. But these are different inferences that are just as reasonable as those which the government could answer.

The testimony by Detective May was next. And it was interesting. He's the detective that talked about how you can't – did you test for fingerprints? Well, you can't test for fingerprints if the spray paint has been done. And the other officer should not have sprayed with spray paint because that makes it so you can't test for fingerprints.

Then Detective May acknowledged on cross-examination that he had, in fact, tested for fingerprints, and he didn't find any. So that apparently when he came up with, well, it must be because there was spray paint on it. And yet, later, the government's expert, Mr. Kong, who had impressive credentials, came all the way from San Francisco, he testified that he did not observe any fingerprints on the bullets when he looked through a magnifier. And, in fact, he didn't see any paint that had been sprayed on there.

So I think most police officers are well meaning. I can't reach any other conclusion other than Officer May was lying to us or just was sadly mistaken or somehow when he was [35] on the stand and telling us, well, you can't tell if there's fingerprints because there was that paint splatter. And yet, we're told that, in fact, no paint was found. And we saw photos here that expert Kong showed, and it didn't show any paint on those.

Detective May, he apparently accused Ricardo Gonzales of doing the shooting. At one point he accused Coby Painter being the shooter. They went and they arrested Vashti Perez on this – for this thing a day after it occurred in the park. It just seems like it was all over the place of wanting to accuse one person and then another.

Officer Croft testified and talked about the things he did on the search. He used a flashlight. They looked all around the car. This was not just a couple-minute search. The tape, I mean, the government's asked you to watch the tape, and I think the tape is informative and instructional as to just how thorough of a job that they did.

Now, it was curious Nathan Croft, he said, oh, Justus Rosemond in the front seat, he was moving all around, so it made me really suspicious of him. Well, then you need to do a more thorough search. Oh, no, I did a more thorough search. It doesn't add up. The fact is that officers did the thorough search of the car, and they found no gun.

The prosecution has brought up, well, it was further gesture, furtive gestures. He was moving around. It [36] must show proof beyond a reasonable doubt that he committed this crime.

Well, Trooper Croft had my client get out. He's in back. And then you saw the tape where he thought my client was making furtive gestures. And Trooper Croft testified that that made him suspicious because he was doing furtive gestures while he was out in the back of the car. And yet, these things that made the officers so suspicious, the officers searched him right there and saw that there were not any guns or drugs or contraband on my client after all these things that made the officer so suspicious. So it was – it was interesting testimony from Trooper Croft.

We had testimony from Coby Painter. You know, earlier I thought about maybe it was Mr. Painter or Mr. Gonzales that brought the firearm, fired it to fend off people and then ran away. I don't know. But it is Mr. Painter who is in jail for possession of a firearm, so that's a reasonable inference you could make. He says that – well, it was interesting, you know, the government is saying, let's believe what Mr. Painter says instead of what Ricardo Gonzales says. And yet, it was Coby Painter that denied having told officers that his mother picked him up. And then during his testimony he said that Ricardo picked him up. And then later in his testimony he said that it was a lady, Valerie Goings, that came to pick him up. And then he [37] acknowledged that he had changed his testimony.

On the other hand, if we believe his testimony, he did indicate as well as Ricardo Gonzales indicated that the person that was in the front seat did not turn around, did not speak, just was there. And again, it stretches the imagination to say that there is proof beyond a reasonable doubt as to these serious

crimes as to saying that my client was the one that committed them.

Ricardo Gonzales, again, he was very clear that he was sitting next to the person with the Peyton Manning jersey number 18, the blue jersey. He could see it right on the shoulder, the 18. As we see the video stop, we can see that, indeed, it is Ronald Joseph that gets out of the back seat on the driver's side on the left seat. He's wearing the Peyton Manning jersey.

He talked about, that is, Coby – excuse me – Ricardo Gonzales talked about Vashti. He called her Vash. That's an indication of his familiarity with her. He indicated that he had come to see her various times. And, in fact, he was surprised that Vash came alone. And so he was looking up in the rearview mirror to look at Vashti, why are these other people there? And I just got the distinct impression that she had sold him drugs before. I don't have any direct proof of that. But that's as reasonable assumption as it is that my client was the owner of the drugs and the [38] bringer of the drugs. Vashti denied that she had ever met with Ricardo Gonzales alone. But again, his testimony was clear that she had come and recognized her car, and she usually comes alone. And then Ricardo stopped himself, you know, as if he was going to say, when she sells me drugs. But he didn't say that.

Next Vashti Perez, Vashti Perez testified, and that was interesting testimony. She – even though Ricardo implied, at least in my mind, that she had sold him drugs before, she confirmed that she was there to sell them drugs, so that was consistent. The best liars are those that don't lie about everything. If

you ask, is it day or night, and you say it's night and you can see that it's day, then you know I'm lying. So the best liars sprinkle what they say with some truth.

The officer that interviewed Vashti again, found that she was a person who can look you right in the eye, talk to you for hours and never tell you the truth.

You know, it's interesting this association between Vashti, Ronald Joseph, and yet apparently, they had known each other for about six months prior to this. And we know from the testimony that my client had just come to town recently, that neither of them had met him before – well, there was some testimony by Ronald about knowing his brother, knew my client's brother in Texas, something of that nature. But, [39] indeed, in this association, this prior association between Ronald Joseph and Vashti Perez that gives them the opportunity to be on a drug deal together and is consistent with my client being described as being in the front seat not turning around, not saying anything. And it's not sufficient to convict someone that they're present if a crime occurs. It is required that the person participate in some way in order to convict them, that they're aiding, that they're abetting, that they're assisting. And there certainly is not proof beyond a reasonable doubt of that in this case. In fact, the government was talking about what inferences are reasonable. Here we have Ronald Joseph that is the nephew of Tracy Joseph that Vashti Perez is dating. And Ronald, of course, he didn't want to say that he was in on the drug deal and that he fired a weapon. And, of course, Vashti does not want to say that her boyfriend's nephew was the person that was at fault. And so when the police are interviewing them, my client apparently has

returned to his home in Texas, at least the testimony was that he had gone and returned. And so it's the person who isn't there who gets blamed.

And that reminds me sometimes of when I was a kid, I grew up with some brothers and sisters. And sometimes when something bad happens, and the parents are investigating who did it, sometimes the sibling who isn't there at the present gets blamed for it. It's just kind of human nature. And that [40] certainly is a plausible explanation of what has happened here.

There's a signed statement that the government was pointing out that talked about how Vashti said that Justus Rosemond shot the gun. Again, she has every incentive to fabricate that statement. But in addition, you'll recall one of those specific jury instructions which the Judge read to you this morning that says that – let me get to it here – that says that you may not use an earlier statement as evidence of the truth of matters that are contained in the prior statement.

That is – that is, if you see someone's testimony here and you see that they have contradictory statements and you can't use that earlier statement they contradict, that's proof of what they did. You wouldn't want to use it, anyway, because again, Vashti has this motive to lie about this. But that's an additional factor that is not to be used to show what happened here.

Vashti said in her testimony, again, I can't tell you which parts of her testimony to – it's hard to know, did they lie about everything? I mean, probably her name is Vashti. She probably has different pieces in there. But she was clear in saying that she didn't see

who fired. She didn't see a gun at her house. She didn't see marijuana. She did admit that she knew Ronald from prior. [41]

Ronald Joseph, his testimony was interesting. He's the one guy that said that Justus brought the drugs. And he's a guy who, of course, doesn't want himself to be thought of as the person using the – who brought the drugs.

There's an instruction, and one of the rules is that if you find a person's testimony to be false, then you can use that in determining the credibility of the other things to say again that you're the judges of the person's credibility, and you determine whether all or part of what they say is true.

But Ronald Joseph, one guy who said that my client brought the drugs, that's the very person that the government in their argument was acknowledging that – well, the government said he was mistaken. I'm guessing that it's hard to forget about a lot of things that happened when there is some gunfire going off. I mean, you know, I think I would probably remember that what happened. And yet, the government is saying, well, you know, he must be wrong about this and about this. Maybe he's lying about that. That would be a possibility.

So the evidence is clear that he's the guy that was in the back seat when the car was pulled over. It was interesting that he said that he was – he was sitting on the left side of the back seat with Justus. And he says he got out – as the shots were fired he got out on the left side. [42] The driver's side? Yes, the driver's side. Which side did you get back in? I got back in on the same side again. On the driver's side.

And we know that Vashti was in the driver's seat. And so that means that he must have been in the back seat. And, voila, when the car is pulled over, he's in the back seat. Well, that might lead us to conclude that, in fact, he was in the back seat.

So again it stretches the imagination to speculate, oh, it must have been Justus in the back seat, Justus Rosemond in the back seat who got slapped who was showing the drugs, et cetera.

Chris Thompson testified. Again, he talked about how they searched the route. Nothing was found. We've talked about that.

Again, Detective Niesporek, did you find Vashti to be truthful? No. He did acknowledge that he said, you know, I said, did you say this? And he said, yeah, I probably did where he says, I don't think your friends were totally at fault, either.

You know, this is a case where I can't tell you what happened. You know, it said that truth is stranger than fiction. This is a case where just everything is all over the place. And the question is, whether this person is to be convicted based on this speculation and this contradictory [43] evidence.

Kent Owens, we talked about Howard Kong. He looked at the bullet, and he didn't find any spray. We talked about – well, Kent Owens, we have talked about. You know, he said, yeah, that the ammunition was made out of state.

Okay. That brings us back to what this case is about. Again, like a game of Clue. We have a crime that was in the park. We have a crime that was with the gun. But the question is whether this crime was committed by Justus Rosemond. And I would submit

to you that on the facts, on the evidence that was presented, that this is a case where – I don't even think – this is not a close case. This is not – well, I don't know. There's, I mean, this is a case where the government has nothing. This is a case that begs out for you to find Justus Rosemond innocent, because in our society, we do not convict people of serious crimes or of any crime unless as fact finders we are persuaded there is proof beyond a reasonable doubt.

Now, I'm going to sit down in just a minute, which you'll probably be happy to see will be the thing. And I'm not as eloquent speaker as the government is. But I do hope that you will listen to my comments as well as the government's. There's some psychologists that say you remember the first thing you hear and you remember the last thing you hear. In closing argument the government gets to [44] speak first and last since they have the burden of showing proof beyond a reasonable doubt.

So I hope that you will remember what I've said as well as consider what the government has said, and to carefully deliberate, to not surrender views that you hold one way or the other unless after looking at all the evidence carefully you are convinced that other members of your – other jurors have a good point. That is to deliberate to consider everything. Keep an open mind. Not rush to judgment in such an important matter.

And again, on these facts with all of this contradiction, I ask that you find my client Justus Rosemond not guilty on each of these charges. Thank you.

THE COURT: Thank you, Mr. Gregersen.

Ms. Travis, rebuttal?

MR. TRAVIS: Thank you, Your Honor.

Ladies and gentlemen, Mr. Gregersen is correct, there are inconsistencies in the statements and testimonies by the witnesses who came here and spoke to you. But I would submit to you that just because a witness such as Darrell Waters who is sitting on his front porch on the night of August 26, 2007, just because he says that a car that drove by after the shooting was white doesn't mean he was lying, and it doesn't mean that his testimony about the bullets that went by him shouldn't be believed. [45]

People forget. People make mistakes. And I would submit to you that these witnesses, you would expect these witnesses to not remember all the details from three years ago. If they did remember every detail or if their testimonies were identical, I would say – I would submit to you that that would be a cause for concern. That's – people don't remember things in the same way. People don't always get things correct.

We are not alleging here that people lie. What we're alleging in certain cases is they may have been mistaken. And we're asking you to look at the totality of the facts. And you're going to have – because you're going to have to sort through these and you're going to have to look at inconsistencies and make judgments, some inconsistencies may be irrelevant; some may be more relevant.

Despite what Mr. Gregersen said, there is substantial evidence that the marijuana here belonged to Justus Rosemond. Vashti Perez said it belonged to Justus Rosemond. Ronald Joseph said it belonged to Mr. Rosemond. And I want to emphasize again Coby Painter. Coby Painter doesn't know

Justus Rosemond. He knows Vashti, and that's all he knows. What did he tell you? Vashti called him up and says, I've got a couple of guys up here from Texas who want to get rid of some marijuana. Why would Vashti Perez before any of this has ever happened make up a lie and say the [46] marijuana belonged to the two guys from Texas that we know are Justus Rosemond and his brother? She wouldn't. This is what she said. She said the deal was two guys from Texas. That's who the marijuana belongs to.

Vashti did know Ronald Joseph a little bit. She did. She said that she had known him. Ronald may have said, one of them said they had known each other for a couple months or so.

And Mr. Gregersen wants you to think, oh, well, Vashti is going to lie because Ronald is a nephew of her then boyfriend Tracy Joseph, and she's going to protect Ronald Joseph. But the evidence again is that Justus Rosemond and his brother were childhood friends of Tracy Joseph. There's no evidence that somehow Tracy Joseph would say, protect, you know, Ronald, but don't protect my friends who came up here from Texas. And there's no evidence that Vashti Perez was trying to protect anyone. Her stories were inconsistent. But if you look at them, if she's trying to protect Ronald Joseph, then why did she originally make statements about Justus Rosemond? She did originally make statements, but here in her testimony she didn't. And Ronald Joseph now has immunity, and yet, is she blaming them out? Does she now have the ability to tell the truth. No. She's telling you, I don't remember things.

Now, you have to assess her credibility on those [47] issues. I would submit perhaps she doesn't

remember. Perhaps she didn't want to remember and doesn't want to say. But she did remember who the dope belonged to, and she did even explain to you why she made that statement originally to Detective Niesporek that Justus Rosemond was the shooter. She told you, no, I didn't really see it. I figured he had to be because he owned the dope. That's why she said it. Now, if she really wanted to lay him out, she could have said, he was the shooter. I saw him. And she didn't.

Again, those are issues that you do have to sort through. As we've indicated, we don't have great witnesses here. We have been involved in a drug trafficking deal where shots were fired. All of them. And Mr. Gregersen is going to point and has pointed at Coby Painter and Ricardo Gonzales as the guys with the gun. There is absolutely nothing in the record that would support that finding.

We have an independent witness Kala Hamilton, they walked or who she saw walked from Broadway. We have Coby and Ricardo saying, we walked from Broadway. If they had a gun, why in the world were they running away? Why in the world did Kala and Chelsie indicate that the shots were coming from the area of the car as the people were running? Why would Ricardo Gonzales be zig-zagging and run out of his hat, and why would Coby Painter run out of his shoes if they had the gun? They didn't have a gun. They were in over their heads, [48] and they got out of their as fast as they could.

And you'll remember, Mr. Gregersen asked Trooper Croft, were there any bullets holes in Vashti Perez's car? No. There was nothing like that. If Ronald Joseph or Coby Painter had been firing at the

people in the car, you might expect there would be a bullet hole in the car, and there wasn't.

Ronald Joseph and Coby Painter did exactly what they told you they did. They went to do the deal. And if, in fact, Mr. Gregersen is saying that that's the truth, then why in the world wouldn't Vashti Paris say immediately it was Coby or it was Ricardo who had the gun? I mean, she does have Justus Rosemond, the childhood friend of Tracy Joseph. She's got Ronald Joseph, the nephew. Why wouldn't she layout Ricardo or Coby right way?

Because it wasn't Ricardo or Coby. And, in fact, that the evidence seized at the scene and the trajectory from the bullet. From the parking lot in a westerly direction, the direction that Ricardo is running. As Darrell Waters said, they can see him zig-zagging, and they can hear the bullets through the trees. Those bullets are going west. They are not going easterly toward the car.

Now, that's all this – Mr. Gregersen argued that we were speculating, we're merely speculating about the gun. This isn't speculation. There was a gun. There was a [49] 9 millimeter at Elton Park that night. No gun was found in the parking lot. Nobody reported a gun being found anywhere along the route. And I say common sense tells you the gun went with them in the car, but you've got independent objective evidence that the gun was nowhere else. Nobody called two days later and said, hey, just found this 9 millimeter under, you know, the bushes in my front lawn. No one did that. The gun went with them. Logically it would have gone with them. Common sense tells you it went with them.

And you can criticize, and I'm sure Trooper Croft is kicking himself. He told you, he said he didn't do a great search. And Becky Bracken said, I did a thorough search, but she also told you we miss things. And she indicated she thought she missed something. Trooper Croft said there was a child seat in the back seat, and he was working around that child seat. And he told you he was uncomfortable. He made the stop, but he made the stop for Tooele PD. And he kept waiting for Becky Bracken to take over. And she – you can watch the video. She was really not that interested. And I'm sorry to say that, but that's the fact. They missed the gun. That gun was in the car. And Ronald Joseph told you it was in the car. And if it had been thrown out of the car, why wouldn't Ronald Joseph had said, he can still take blame away from himself and say, well, Justus Rosemond threw it out of [50] the car. There's no evidence that that gun was either abandon in Elton Park or thrown out of the car. The gun was in the car, and the police simply missed it.

Now Mr. Gregersen talks about the fact that Mr. Rosemond was in Texas. And I'll say – I'll ask you about that fact from the government's perspective. Who left the state right after the shooting? It wasn't Vashti Perez. It wasn't Ronald Joseph who got out of here. They were both located right after the shooting. It was Justus Rosemond who says, I am getting out of Utah. I am getting out of here. He was nowhere to be found. Detective Niesporek did not find him. He had gone back to Texas.

I'd also point out to you in the video as you watch it, and again just a little nuance, Justus Rosemond is pulled out of the vehicle. He's now at the back with

Trooper Croft who's patting him down and asks him, is there a weapon in the car? Nothing. He didn't answer. Croft has to ask him that question again, and then no. No. No.

And from your experience, life experience, when people don't answer a question, it's not that he didn't hear it, he didn't want to answer that question. It was because he knew, yeah, there's a gun in the car. He didn't answer for that reason.

There really is no other explanation except for the fact that Justus Rosemond was at Elton Park to do a drug deal, [51]because even if Mr. Gregersen somehow is right that the marijuana belonged to Vashti Perez or Ronald Joseph, why was he there? He was participating in the deal. We know he didn't know Vashti very well. He didn't know Ronald very well. Ronald knew his brother. Didn't know Justus very well. And yet, he's driving with these two to a drug deal at a park with two guys who are going to buy the dope that he doesn't know? Does that logically make any sense to you? He wouldn't have been in that car if he hadn't been part of that deal. Everybody in that car was part of that deal. Vashti set it up. Ronald was interested in making some business connections and interested in what was going on. He was involved, and Justus Rosemond was there because it was his pound of marijuana. Remember, I got friends, two guys from Texas who got a pound they want to unload. Two guys from Texas. And the two guys from Texas were Justus Rosemond and his brother. No one else.

Again, the gun was fired. There is no doubt a gun was fired. This is not speculation, at least seven

rounds fire in a westerly direction, from the vehicle, the area of the vehicle, firing at people running away.

Ricardo Gonzales's hat is on Broadway. He was running. Coby Painter's shoes are in the parking lot because he was running so hard he ran out of them.

There was a gun. The gun was in that car. And, [52] yes, the police missed it. But it was there, and it was hidden by Justus Rosemond when Nathan Croft put on those overheads. And you can see it in the video.

We would submit to you, ladies and gentlemen, that the government has, in fact, proved Justus Rosemond possessed marijuana with intent to distribute it the night of August 26th, 2007. We've said it was his marijuana, but we've also said he was there participating. And we've also proven that Justus Rosemond, he used a firearm, he carried a firearm, he brandished a firearm and he discharged a firearm during and in relation to that drug trafficking crime.

And Mr. Gregersen wants you to think that somehow the government has abandon that position for the legal theory of aiding and abetting. We have not abandon that position. We are here because seven rounds were fired in a drug deal at Elton Park, and we're here because evidence establishes that this man did it. And the fact that I instruct you on alternative legal theory does not mean that the government is trying to somehow say that anything else happened than what happened with Justus Rosemond firing that weapon.

What we are saying is that under the law if there is some sort of thinking in your mind where you can't quite grasp onto him actually discharging the

firearm, he is guilty of aiding and abetting anyone else with the discharge of that firearm because the facts establish that. It is a legal [53] theory.

But we're here because he fired that gun, and he endangered the lives of everyone in the trajectory of those seven bullets that went northwest. And you saw David Hammond, Mr. Hammond, an elderly gentleman, who a bullet landed on his front porch. And we submit to you that bullet came from Elton Park, and that's why we were here.

I ask you to return a verdict of guilty on all counts.

THE COURT: Thank you, miss Travis. I'll ask the Court security officer to come forward and be sworn, please.

(Whereupon, the requested proceedings were concluded.)

* * *

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	**JURY INSTRUCTIONS**
vs.	**Case No. 2:07CR886DAK**
JUSTUS ROSEMOND,	
Defendant.	

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and are about to hear the arguments, it becomes my duty to instruct you on the law that applies to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

Counsel may refer to these instructions in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are of course to be governed by the Court's instructions.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

* * *

INSTRUCTION NO. 10

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time before trial the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

If you find that a statement is inconsistent with the testimony the witness gave at this trial, you may

consider the earlier statement in deciding the truthfulness and accuracy of the witness's testimony in this trial. You may not, however, use the earlier statement as evidence of the truth of the matter contained in that prior statement.

* * *

INSTRUCTION NO. 21

Count I of the Superseding Indictment charges the defendant, JUSTUS ROSEMOND, with possession of marijuana with intent to distribute. This count reads as follows:

COUNT I

> On or about August 26, 2007, in the Central Division of the District of Utah, JUSTUS ROSEMOND, defendant herein, did knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance within the meaning of 21 U.S.C. § 812, and did aid and abet therein; in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and punishable under 21 U.S.C. § 841(b)(1)(D).

The defendant is charged with violating the Drug Abuse Prevention and Control Act. That law makes it a crime "for any person knowingly or intentionally to distribute a controlled substance."

INSTRUCTION NO. 22

In order to prove Count I, the government must establish, beyond a reasonable doubt, each of the following elements of the crime with respect to Count I of the Superseding Indictment:

1. That the defendant possessed a controlled substance;

2. That the possession was knowing or intentional; and

3. That the defendant intended to distribute the controlled substance.

* * *

INSTRUCTION NO. 24

As I have instructed you, you must find that the defendant "possessed" the controlled substance. The legal concept of possession may differ from the everyday usage of the term, so I will explain it in some detail.

Actual possession is what most of us think of as possession; that is having physical custody or control of an object. For example, if you find that the defendant had the controlled substance on his person, you may find that he had possession of the controlled substance.

However, a person need not have actual physical custody of an object in order to be in legal possession of it. If an individual has the ability to exercise substantial control over an object that he does not have in his physical custody, then he is in possession of that item.

An example of this from everyday experience would be a person's possession of items he keeps in the safe deposit box of his bank. Although the person does not have physical custody of those items, he exercises substantial control over them and so has what is known as constructive possession of them.

Here is another example. Suppose A is negotiating the price of a controlled substance with B. Standing next to A is C, who has several envelopes of marijuana in his pocket. After a period of

negotiation. A directs C to hand over to B a few of the envelopes. B then hands A some money. In this situation you could find that C has possession of the controlled substance because he had the envelopes of marijuana in his pocket. However, you could also find that A has possession of the controlled substance because of his proximity to the marijuana, his other association with the person — C — in actual possession of it, and his negotiations over price. This example is not conclusive, but is simply meant to illustrate the notion of constructive possession. Possession of a controlled substance cannot be found solely on the grounds that the defendant was near or close to the controlled substance. Nor can it be found simply because the defendant was present at a scene where the controlled substance was involved, or solely because the defendant associated with a person who does control the controlled substance or the property where the controlled substance is found. However, these factors may be considered by you, in connection with all other evidence, in making your decision whether the defendant possessed the controlled substance.

* * *

INSTRUCTION NO. 26

Your decision whether the defendant knew the material he possessed was a controlled substance involves a decision about the defendant's state of mind. It is obviously impossible to prove directly the operation of the defendant's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in the case may enable you to infer what the defendant's state of mind was.

In our everyday affairs, we are continuously called upon to decide from the actions of others what their state of mind is. Experience has taught us that, frequently, actions speak louder and more clearly than spoken or written words. Therefore, you may well rely in part on circumstantial evidence in determining the defendant's state of mind.

For example, if the defendant was the sole occupant of an apartment, it is reasonable to conclude that the defendant knew about items in the apartment. The defendant's behavior may also indicate knowledge. Nervousness in the presence of controlled substances or flight from the site at which authorities have identified drugs may indicate that the defendant knew that the material in question was a controlled substance. These examples are neither exhaustive nor conclusive. It is up to you, based on all the evidence, to determine whether the defendant knew that he possessed a controlled substance.

* * *

INSTRUCTION NO. 30

To prove that the defendant possessed a controlled substance with the intent to distribute it, the government must prove beyond a reasonable doubt that the defendant had control over the drug with the state of mind or purpose to transfer it to another person.

The same considerations that apply to your determination whether the defendant knew he possessed a controlled substance apply to your decision concerning the defendant's intention to distribute it. Since you cannot read the defendant's mind, you must make inferences from his behavior. However, you may not convict the defendant unless

these inferences convince you beyond a reasonable doubt that the defendant intended to distribute the controlled substance.

When I say that you must find that the defendant intended to distribute the controlled substance, this does not mean that you must find that the defendant intended personally to distribute or deliver the drug. It is sufficient if you find that the defendant intended to cause or assist the distribution of the controlled substance. Basically, what you are determining is whether the drug in the defendant's possession was for his personal use or for the purpose of distribution. Often it is possible to make this determination from the quantity of the drug found in the defendant's possession.

The possession of a large quantity of a controlled substance does not necessarily mean that the defendant intended to distribute it. On the other hand, a defendant may have intended to distribute a controlled substance even if he did not possess large amounts of it. Other physical evidence, such as paraphernalia for the packaging or processing of the drug, can show such an intent. There might also be evidence of a plan to distribute. You should make your decision whether the defendant intended to distribute the controlled substance in his possession from all of the evidence presented.

* * *

INSTRUCTION NO. 32

Count II of the Superseding Indictment charges the defendant, JUSTUS ROSEMOND, with carrying, using, brandishing or discharging a firearm during and in relation to a drug trafficking crime. This count reads as follows:

COUNT II

On or about August 26, 2007, in the Central Division of the District of Utah, JUSTUS ROSEMOND, defendant herein, during and in relation to the drug trafficking offense set forth in Count I, did knowingly use, carry, brandish and discharge a firearm, to wit, a 9mm handgun, and did aid and abet therein; in violation of 18 U.S.C. § 924(c)(1)(A) and 18 U.S.C. § 2.

If upon all the evidence you find that the government has failed to prove Count I beyond a reasonable doubt, then you will proceed no further as to Count II. Count II is to be considered only if you first find the defendant guilty under Count I. In reaching your verdict on Count II, you may consider the evidence of Count I only for the purpose of determining whether the elements of Count II have been satisfied.

INSTRUCTION NO. 33

In order to prove the charges against the defendant, JUSTUS ROSEMOND, with respect to Count II of the Superseding Indictment, the government must establish, beyond a reasonable doubt, each of the following elements of the crime:

1. That the defendant committed a drug trafficking crime;
2. That the defendant knowingly possessed a firearm; and
3. That the possession involved carrying, using, brandishing or discharging the

firearm during and in relation to the drug trafficking crime.

INSTRUCTION NO. 34

The first element the government must prove beyond a reasonable doubt is that the defendant committed a drug trafficking crime for which he might be prosecuted in a court of the United States.

Defendant is charged in Count I of the Superseding Indictment with committing the crime of possession of marijuana with intent to distribute. I instruct you that the crime of possession with intent to distribute is a drug trafficking crime. However, it is for you to determine whether the government has proven beyond a reasonable doubt that the defendant knowingly committed the crime.

INSTRUCTION NO. 35

The second element the government must prove beyond a reasonable doubt is that the defendant knowingly possessed a firearm during and in relation to the commission of the crime charged in Count I.

A "firearm" is any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

To "possess" means to have something within a person's control. This does not mean that the defendant must hold it physically, that is, have actual possession of it. As long as the firearm is within the defendant's control, he possesses it. If you find that the defendant either had actual possession of the firearm, or that he had the power and intention to exercise control over it, even though it was not in his

physical possession, you may find that the government has proven possession.

The law also recognizes that possession may be sole or joint. If one person alone possesses it, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the firearm. This is called joint possession. If you find that the defendant had such power and intention, then he possessed the firearm under this element even if he possessed it jointly with another. Proof of ownership of the firearm is not required.

To satisfy this element, you must also find that the defendant knowingly possessed the firearm. This means that he possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law.

INSTRUCTION NO. 36

In Count II, the defendant, JUSTUS ROSEMOND, is accused of carrying, using, brandishing or discharging a firearm during and in relation to a drug trafficking crime. For you to find the defendant guilty of this crime, you must be satisfied that the government has proven each of the following things:

First, the defendant committed the crime of possession of marijuana with intent to distribute; and

Second, the defendant knowingly used, carried, brandished or discharged a firearm during and in relation to the commission of that crime.

The word "knowingly" means that an act was done voluntarily and intentionally, not because of mistake or accident.

To "carry" a firearm during and in relation to a crime means to move or transport the firearm on one's person or in a vehicle or container during and in relation to the crime. It need not be immediately accessible. The firearm must have some relation or some connection to the underlying crime or must have been intended by the defendant to have some relation or connection in the crime. However, that need not have been its sole purpose.

A defendant "used" a firearm if he actively employed the firearm during and in relation to the drug crime. To "use" a firearm means more than a mere possession and more than proximity and accessibility; it requires active employment of the weapon as by brandishing or displaying it in some fashion.

The term "brandish" means to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

The term "discharge" means to shoot or fire.

The phrase "during and in relation to" the commission of an offense means that the firearm must have some purpose, role, or effect with respect to the drug trafficking crime.

INSTRUCTION NO. 37

In addition, Counts I and II of the Superseding Indictment charge the defendant, JUSTUS

ROSEMOND, with aiding and abetting violations of the Controlled Substances Act. Aiding and abetting is simply another way of committing the offenses charged in those counts.

The aiding and abetting statute, Section 2(a) of Title 18 of the United States Code provides that:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

INSTRUCTION NO. 38

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant physically committed the crime with which he or she is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then

you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly seeks by some act to help make the crime succeed.

As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:

(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and

(2) the defendant knowingly and actively participated in the drug trafficking crime.

INSTRUCTION NO. 39

Count III of the Superseding Indictment charges the defendant, JUSTUS ROSEMOND, with being a person convicted of a crime who possessed ammunition transported in interstate commerce. This count reads as follows:

COUNT III

> On or about August 26, 2007, in the Central Division of the District of Utah, JUSTUS ROSEMOND, defendant herein, having been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess ammunition in and affecting commerce, in violation of 18 U.S.C. § 922(g)(1) and punishable under 18 U.S.C.§ 924(a)(2).

The relevant statute on the subject is 18 U.S.C. § 922(g)(1), which provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to . . . possess in or affecting commerce, any fireaim or ammunition.

Congress was of the view that the ease with which persons, including criminals, were able to acquire firearms and ammunition was a significant factor in the prevalence of violent crime in the United States, and that federal control over the distribution of firearms would be helpful to state and local authorities in meeting this problem. Accordingly, it passed a series of laws aimed at giving support to federal, state, and local law enforcement officials in combating crime and violence.

You are not to be concerned with the wisdom or the policy of those laws. If in fact a violation of law has occurred, the law should be enforced.

In general, those laws include provisions which prohibit certain categories of persons from possessing firearms and ammunition which have been shipped in interstate commerce.

INSTRUCTION NO. 40

You need not make any determination on the first element of this crime. The United States and the Defendant have stipulated to the fact that Mr. Rosemond, at the time of his alleged possession of the ammunition, was a person who had been convicted of an offense that carries a sentence of one year or more imprisonment.

INSTRUCTION NO. 41

The second element which the government must prove beyond a reasonable doubt is that on or about August 26, 2007, the defendant possessed the ammunition as charged in Count III.

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propelled powder designed for use in any firearm.

The same instructions which guide your consideration of "possession" regarding the drugs alleged in Count I should govern your consideration regarding the possession of the ammunition alleged in Count III.

To satisfy this element, you must also find that the defendant knowingly possessed the ammunition. This means that he possessed the ammunition purposely and voluntarily, and not by accident or mistake. It also means he knew that the item was ammunition, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law or even that he knew that persons convicted of a crime punishable for a year or more are prohibited from possessing ammunition.

* * *

INSTRUCTION NO. 43

Count IV of the Superseding Indictment charges the defendant, JUSTUS ROSEMOND, with being an illegal alien in possession of ammunition. This count reads as follows:

COUNT IV

On or about August 26, 2007, in the Central Division of the District of Utah, JUSTUS ROSEMOND, defendant herein, being an alien illegally and unlawfully in the United States, did knowingly possess ammunition in and affecting commerce, in violation of 18 U.S.C. § 922(g)(5)(A) and punishable under 18 U.S.C. § 924(a)(2).

INSTRUCTION NO. 44

In order to prove the charge against the defendant JUSTUS ROSEMOND, the government must establish, beyond a reasonable doubt, each of the following elements of the crime with respect to Count IV of the Superseding Indictment:

1. That the defendant is an alien who was illegally or unlawfully present in the United States at the time charged in the Superseding Indictment;
2. That the defendant knowingly possessed ammunition; and
3. That the ammunition allegedly possessed by the defendant had been in or affected interstate or foreign commerce.

INSTRUCTION NO. 45

You need not make any determination on the first element of this crime. The United States and the Defendant have stipulated to the fact that Mr. Rosemond, at the time of his alleged possession of the ammunition, was an alien illegally or unlawfully present in the United States.

INSTRUCTION NO. 46

The second element the government must prove as to Count IV of the Superseding Indictment, is that the defendant knowingly possessed ammunition on or about the date set forth in the Superseding Indictment. The government does not need to prove that the defendant knew that the alleged possession was in violation of the law.

The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propelled powder designed for use in any firearm.

The word "possess" means to exercise authority, dominion, or control over. The law recognizes two kinds of "possession" — actual and constructive possession. Possession may be sole or joint.

* * *

INSTRUCTION NO. 53

If it becomes necessary during your deliberations to communicate with the Court, you may send a note via a Court Security Officer, signed by your foreperson or by one or more jurors. No member of the jury should attempt to communicate with the Court by any means other than a signed writing; and the Court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing or orally here in open court.

You will note from the oath the Court Security Officer will take that he, as well as any other person, is also forbidden to communicate in any way with any juror about any subject touching the merits of the case.

Bear in mind also that you are not to reveal to any person—not even to the Court—how the jury stands numerically or otherwise until you have reached a unanimous verdict.

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JUSTUS ROSEMOND,** **Defendant.**	**SPECIAL VERDICT** **Case No. 2:07CR886DAK**

We, the jury duly impaneled in the above-entitled case, find the defendant JUSTUS ROSEMOND:

1. As to Count I of the Superseding Indictment (Possession with Intent to Distribute Marijuana):

   _____ Not Guilty

   ___✓___ Guilty

   If you found Mr. Rosemond Not Guilty, do not answer Questions 2 & 3 and proceed to Question 4. If you found Mr. Rosemond Guilty, then A Question 2.

2. As to Count II of the Superseding Indictment (Carrying, Using, Brandishing, or Discharging a Firearm During and in Relation to Drug Trafficking):

_____ Not Guilty

__✓__ Guilty

If you found Mr. Rosemond Not Guilty, do not answer Question 3 and proceed to Question 4. If you found Mr. Rosemond Guilty, then A Question 3.

3. Having found Mr. Rosemond "Guilty" of Count II, please check all that apply:

__✓__ We find that the defendant "carried" the firearm;

__✓__ We find that the defendant "used" the firearm;

__✓__ We find that the defendant "brandished" the firearm;

__✓__ We find that the defendant "discharged" the firearm;

Please proceed to Question 4.

4. As to Count III of the Superseding Indictment (Possession of Ammunition by a Person Convicted of a Crime Punishable by Imprisonment for a term Exceeding One Year):

_____ Not Guilty

__✓__ Guilty

Please proceed to Question 5.

5. As to Count IV of the Superseding Indictment (Possession of Ammunition by an Illegal Alien):

_____ Not Guilty

__✓__ Guilty

DATED this 15 day of December, 2010.

/s/_____

FOREPERSON

APPENDIX Y

---

* * *

Transcript of Sentencing Hearing

BEFORE THE HONORABLE DALE A. KIMBALL

* * *

Salt Lake City, Utah, Tuesday, March 1, 2011

* * *

[8] THE COURT: The question about – what was it – there was a question during the deliberations about if you find aiding and abetting, do you still go ahead and answer question 3 on the verdict form, does that change the analysis in your view at all?

[9] MS. TRAVIS: It doesn't to me because I still don't think we know what the jury – what the basis for their verdict was.

THE COURT: We don't.

MS. TRAVIS: We don't.

THE COURT: We do know they checked the boxes, that's one thing we do know.

MS. TRAVIS: That's correct, they checked the boxes. Aiding and abetting – an aider and abetter has equal liability to a principal. Whether they found that Ronald Joseph fired the gun or they believe that Justus Rosemond fired the gun, they found the defendant guilty of the 924 (c) violation and they found that the gun had been discharged, and that's the 10-year minimum mandatory, and that would be our position.

We believe, Your Honor, that a guideline sentence here would in fact be appropriate. Looking at the defendant's PSR he does have some history of violence, terroristic threats, assault, escaped while under arrest. And, again, at the time of this incident he was illegally in the United States, although he could not be charged in the Indictment because, as the court is aware, he wasn't arrested that day and, therefore, was not found in the United States at that point in time. Your Honor –

THE COURT: Another case on that that's been resolved.

MS. TRAVIS: Yes, he was charged in a separate Indictment, Your Honor. I'm just pointing out [10] that at the time of this incident the defendant was in the United States illegally.

The defendant's conduct endangered the lives of innocent people living in the Elton Park area, and it also endangered the lives of everyone involved in that drug deal. This is a pound of marijuana, and Coby Painter, Ricardo Gonzales didn't happen to have guns, but we could have had a shootout in Elton Park based on what we believe to be the defendant's conduct, and we believe that the evidence showed that the defendant was the shooter. And this is exactly the case that Congress was looking at when it passed 18 USC Section 924(c) because Congress recognized that when you're in a crime of violence or drug trafficking because drugs, we all – the Tenth Circuit has recognized that guns are a tool of the trade for drug traffickers, the potential for Serious violence is so great, this is why Congress enacted 924(c). And what happened that night in Elton Park is exactly – just illustrates exactly what Congress

was talking about. Here you have again a measly one pound of marijuana deal, and you could have had people involved in that deal dead and you could have had innocent people in the neighborhood dead because of the defendant's conduct. And our position would be, as a result of all of those factors, that the guideline range – the guideline [11] sentence of 177 I believe to 191 would in fact be reasonable and appropriate.

THE COURT: Guideline sentence of what did you say?

MS. TRAVIS: Pardon?

THE COURT: What did you say a guideline sentence of what?

MS. TRAVIS: I think 177 is the low end, Your Honor. It's 57 months on the marijuana trafficking, but, again, that's based on the defendant's criminal history, but – and 10 years on the discharge of a firearm.

PROBATION OFFICER: Your Honor, yesterday the defendant was sentenced in Judge Campbell's, and that adds two extra points, so his guideline range would be a Category V instead of IV, the guideline range is 70 to 87 months.

* * *

[33] THE COURT: * * * So I'll give you I think on Count I, III and IV 48 months is sufficient, but I think, given what the jury verdict was, I have to give you 10 years consecutive on Count II.

It's the judgment of the court that the defendant, Justus Rosemond, is placed in the custody of the United States Bureau of Prisons for a period of time 48 months on Counts I, III, and IV, and 120 months

on Count II, for a total of 168 months to run concurrently [34] with the sentence imposed in Case 1:10-cr-93.

Now, I want to make it clear so it will be clear on appeal, if this appeals, that I don't see any difference between the violent cases in the Tenth Circuit and underlying drug trafficking, so if that's an issue and the Circuit feels differently, that's clear.

If I'm wrong about that, I'll be clearly wrong, and there's no doubt about what my view is.

Upon release from confinement, the defendant 10 shall be placed on supervised release for a term of 60 months.

Within 72 hours of release, if not deported, the defendant shall report in person to the probation office in the district in which the defendant is released.

In accordance with the Violent Crime Control and Law Enforcement Act of 1994, the court orders that if not deported, the defendant submit to one drug test within 15 days of placement on supervision, and at least two periodic drug tests thereafter, as directed by probation. Pursuant to controlling law, the defendant shall submit to the collection of a DNA sample at the direction of the Bureau of Prisons or probation office.

* * *

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JUSTUS ROSEMOND,** **Defendant.**	**NOTICE OF APPEAL** **Case No. 2:07CR886DAK**

NOTICE IS HEREBY GIVEN that the defendant appeals from the judgment and sentence imposed by this court on the 1st day of March, 2011, to the Tenth Circuit Court of Appeals.

Dated this 4th day of March 2011.

/s/ Mark J. Gregersen
MARK J. GREGERSEN
Attorney for Defendant
Justus Rosemond

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
AUG 2 - 2013
OFFICE OF THE CLERK

No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2, requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2013, and the petition was filed on that date. The petition for a writ of certiorari was granted on May 28, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of title 18 of the United States Code provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 924(c)(1)(A) of that title provides, in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition

to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT

For centuries, it has been settled law that to prove a person aided and abetted the commission of a crime requires proof of two facts: that the accomplice (1) "d[id] some act to render aid to the actual perpetrator thereof" or "encourage or set another on to commit a crime," Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* 5, 41-42 (1901 ed.), and (2) did so with the "design to encourage, incite, or in some manner afford aid or consent to the particular act." 1 Francis Wharton, *A Treatise on Criminal Law* § 211, at 229 (10th ed., Philadelphia, Kay & Brother 1896). In the decade before Congress enacted the federal aiding and abetting statute, this Court reversed a criminal conviction because the "defective" jury instruction did not require proof of both of these "condition[s]" for accomplice liability. *Hicks* v. *United States*, 150 U.S. 442, 448-449 (1893). Today, these two prerequisites are so well established that even the government recognizes that accomplice liability requires proof a defendant "acted in some affirmative manner

designed to aid" a crime with the "specific intent to facilitate the commission of a crime by another." U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, *Criminal Resource Manual* § 2474 (Oct. 1998); *id.* § 2475.

This case involves application of these two bedrock requirements to the crime of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, 18 U.S.C. § 924(c), which imposes mandatory "severe penalties" (*Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980)) of between five years' and life imprisonment upon proof that a defendant both (1) "committed all the acts necessary to be subject to punishment for" a violent or drug-trafficking crime, and (2) "used a firearm" "during and in relation to" that offense. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). Although Section 924(c) references, and requires proof of, another crime, it "sets out an offense distinct from the underlying felony and is not simply a penalty provision," *United States* v. *Castillo*, 530 U.S. 120, 125 (2000) (quoting S. Rep. 98-225, pp. 312-314 (1984)), and imposes a sentence that runs consecutive to that predicate offense.

The "vast majority" of courts of appeals have held that a defendant cannot be liable for aiding and abetting a Section 924(c) violation unless he has "'intentionally take[n] some action to facilitate or encourage the use of the firearm.'" Pet. App. 9a-10a (quoting *United States* v. *Bowen*, 527 F.3d 1065, 1079 (10th Cir. 2008)). The court of appeals below is one of a handful that do not require proof of intentional facilitation or encouragement. Instead, it requires

only that the defendant "knowingly and actively participated" in the predicate crime and "knew his cohort used a firearm"—even if the defendant learned of the gun's presence only as it was being used. Pet. App. 7a.

The judgment below must be reversed. The government must prove the defendant intentionally facilitated the use of the firearm during and in relation to the predicate drug offense; "[t]his specific crime—not the [drug offense]—is the crime that [the defendant] was charged with aiding and abetting, and it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *United States* v. *Medina*, 32 F.3d 40, 45 (2d Cir. 1994). The Tenth Circuit's rule permits additional penalties—massive, consecutive, *mandatory* penalties—to be imposed on a defendant without any finding of culpable conduct or intent beyond the predicate crime that is separately punished. Thus, petitioner Justus Rosemond received a four-year prison sentence for his involvement in a drug-trafficking crime and, without *any* finding of additional acts of intentional facilitation, a mandatory ten-year consecutive sentence under Section 924(c). The Tenth Circuit's rule is tantamount to strict liability, which is fundamentally inconsistent with "general principles applicable to accomplice liability." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(f) (2d ed. 2003). "Congress used no language spelling out a purpose so improbable" as imposing the extraordinary sanctions of Section 924(c) based on such attenuated involvement; it is "just too unlikely"

that Congress intended such a result. *Abuelhawa* v. *United States*, 556 U.S. 816, 824 (2009).

1. The government presented evidence at trial that cooperating witness Vashti Perez arranged the sale of one pound of marijuana in Tooele, Utah on August 26, 2007. Pet. App. 2a. According to Perez, she went to a local park with her boyfriend's nephew, Ronald Joseph, whom she had known for months, and with petitioner Justus Rosemond, an acquaintance of her boyfriend who had arrived in Tooele hours earlier; Perez met Rosemond only that evening and would not see him again. J.A. 100, 115-116.

Around 9 p.m., Perez drove Joseph and Rosemond to the meeting place in her four-door 1996 Mazda Protegé subcompact and parked in a well-lit lot. J.A. 102-103. One man sat in the front passenger seat and one in the rear driver's-side seat; an empty child's car seat occupied the rear passenger's-side seat. J.A. 92, 62-63. The two buyers, Ricardo Gonzales and Coby Painter (acquaintances of Perez, J.A. 79), arrived soon afterward. J.A. 38.

Gonzales approached Perez's car and got in the back seat from the driver's side; Painter stood a distance away. J.A. 91-92. The rear-seat passenger handed Gonzales the marijuana to inspect. J.A. 93. Throughout the transaction, both buyers observed that the front-seat passenger "did not turn around and he did not say a word to either of" the buyers. J.A. 87, 92. Gonzales then left the car briefly to confer with Painter, before returning to the rear seat. J.A. 93. Gonzales decided to steal the marijuana because he "didn't know" the men in the car and thought the theft "wouldn't come back to [him]." J.A.

93-94. Gonzales punched the rear-seat passenger in the face, and he and Painter fled on foot with the marijuana. As they did, they heard shots fired in their direction. J.A. 95-96. Perez then drove off "pretty fast" in pursuit of the buyers with Joseph and petitioner in her car. J.A. 109 ("I was trying to catch up to the other guys that took the stuff."). Perez told police that, as the shooter tried to hide the pistol, "one of the men in the car with [her], either Justus [Rosemond] or Ronald Joseph, said 'I don't want to touch the gun.'" J.A. 111, 134.

About one mile away, two police officers stopped Perez's car, "assist[ed]" by county officers who happened to be nearby. J.A. 70. Rosemond, wearing an (unnumbered) Los Angeles Dodgers jersey, was seated in the front passenger's seat. J.A. 69-70. Ronald Joseph, wearing an Indianapolis Colts Peyton Manning jersey, was seated in the rear seat behind the driver. J.A. 62, 76. Police observed Rosemond fidgeting, both while seated in the stopped car and while an officer frisked him as he leaned against the trunk. J.A. 69-70. The officers asked for permission to search the car, and Perez consented. J.A. 62-63. After a "thorough search," J.A. 53, checking and "rechecking what was in the vehicle," J.A. 74, and frisking all three occupants, J.A. 61, the officers found no weapons or drugs, J.A. 63. Of the three, only Rosemond was carrying identification documents. J.A. 59-60, 129.

2. Based on statements Perez made to police, J.A. 22-23, Rosemond was charged with: (1) possession of marijuana with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); (2) discharging a firearm, or

aiding and abetting the discharge of a firearm, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2; (3) two counts of unlawful ammunition possession, relating to shell casings found at the scene, in violation of 18 U.S.C. § 922(g)(1) and (g)(5)(A). J.A. 11-13. Rosemond pleaded not guilty on all counts. Pet. App. 12a.

a. At trial, Perez, Joseph, and the buyers testified under cooperation agreements with the government; several bystanders also testified. There was considerable variation among the eyewitnesses' accounts. The government introduced testimony that two eyewitnesses who "got a good view of the parking lot" (J.A. 146) told police that a lone man had gotten out of the driver's side of Perez's car, fired the shots, and gotten back into the vehicle. J.A. 39, 41-42, 48. With one notable exception, *none* of the witnesses testified that they had seen whether Joseph or Rosemond had fired the shots. Only Joseph—the main alternative suspect, who previously had been convicted of both "providing false information" and burglary in Texas, J.A. 130—testified that Rosemond had fired the gun. J.A. 84, 96, 124, 54 (Officer James May testifying, "we're not sure who the shooter was"). Only Joseph testified that Rosemond, as the shooter, had tried to hide the gun in the car after the shooting. J.A. 127-128. Although Perez had earlier told police she "possibly thought" Rosemond, rather than her boyfriend's nephew, had fired the gun and later tried to hide and dispose of it, J.A. 106, 112, she admitted at trial that she did not see who had fired because her back was turned, Pet. App. 3a; J.A. 107,

and indicated that she did not see who had hidden the gun, J.A. 111-112.

The witnesses disagreed about which man sat in the back seat of Perez's car. Ricardo Gonzales testified that "[t]he guy that was next to me was in an Indianapolis Colts jersey," and he distinctly recalled seeing Peyton Manning's "Number 18" "on the left side of his arm." J.A. 92-93, 97-98. Joseph, who had initially told police he had sat in the *front* passenger's seat, Rosemond Presentence Report 4, acknowledged at trial that he was seated in the "same place in the back seat" behind the driver both before and after the shooting.[1] J.A. 126. Although Perez testified that she thought Rosemond was in the back seat, she conceded she "wasn't looking in the back" and "trying not to listen" to the transaction. J.A. 104. Painter, who was a distance away, described the rear-seat passenger as "bald and wearing glasses" J.A. 83, and Rosemond apparently wore glasses; but *neither* man was bald. See Gov't Ex. 18.

b. The government tried the Section 924(c) count on two alternative theories. First, the government argued that Rosemond was the principal—*i.e.*, the shooter who discharged the firearm. Alternatively, it argued that Rosemond had aided and abetted Joseph's (or Perez's) discharge of the firearm. J.A. 157-158.

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[1] Joseph stated for the first time at trial that he thought that petitioner sat in the back seat with him and Gonzales, J.A. 122—but the prosecution dismissed as "high[ly] unlikely that three grown men were all sitting in that back seat," J.A. 149, given the car's small size and the presence of a child's car seat.

The government and Rosemond each submitted proposed jury instructions on the aiding and abetting theory. Rosemond proposed the following instruction:

> The defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant *intentionally took some action to facilitate or encourage the use of the firearm.*

J.A. 14 (emphasis added). By contrast, the government proposed an instruction that did not require a showing that the defendant intended to facilitate or encourage the use of the firearm. J.A. 16.

The court accepted the government's proposed instruction without material alteration, but acknowledged that "[i]f I'm wrong, [Rosemond's] got a great issue for appeal and it's [the government's] fault." J.A. 140. The court instructed the jury that to find Rosemond guilty of the Section 924(c) charge on an aiding and abetting theory (J.A. 196):

> [Y]ou must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

During closing arguments, the government explained its theory of aiding and abetting:

> Justus Rosemond would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking

> crime and [he] knowingly and actively participated in the drug trafficking crime. So if Mr. Rosemond were to * * * argue that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.
>
> * * * [T]he evidence establishes that Justus Rosemond was involved in the drug trafficking crime. He is involved with the [drug] deal with Ricardo Gonzales. He certainly knew and actively participated in that crime.
>
> And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

J.A. 157-158. Consistent with the trivial showing required to establish guilt under its proffered instruction, the government did not bother arguing that Rosemond's actions before, during, or after the shooting had facilitated or encouraged the use of a firearm, much less that he had done so intentionally. When the government discussed Rosemond's actions, it did so only to support its theory that "he was the shooter." J.A. 156.

c. During deliberations, the jury sent a note asking whether the aiding and abetting theory applied to "question 3 on the verdict form," Pet. App. 40a, which asked the jury to determine whether Rosemond had "carried," "used," "brandished," or "discharged" the firearm, *id.* at 29a (internal quotation marks omitted); see also J.A. 210. The judge responded that

the jury should answer question 3 if it found Rosemond guilty under any theory. J.A. 211. Soon afterward, the jury found Rosemond guilty on all counts; the verdict form indicated it had found Rosemond engaged in each of the four kinds of firearm use listed in question 3. J.A. 202-204. But the verdict form did not require the jury to indicate whether it had found Rosemond guilty of the firearm offense as a principal or as an aider and abettor. Pet. App. 5a; see also J.A. 205 (prosecutor states, "I still don't think we know what the jury – what the basis for their verdict was.").

d. The district court sentenced Rosemond to 168 months' imprisonment, to be followed by 60 months' supervised release. Pet. App. 15a, 18a. Although the Guidelines range for the other counts of conviction was 70-87 months' imprisonment, the court imposed a substantially shorter 48-month sentence. In imposing a consecutive mandatory-minimum sentence for the Section 924(c) count, the district judge explained that he had no choice: "I have to give you 10 years consecutive." J.A. 207; see also 18 U.S.C. § 924(c)(1)(A)(iii), (c)(1)(D)(ii).

3. The court of appeals affirmed. Pet. App. 1a-11a. The court began by acknowledging that, whatever the sufficiency of the evidence supporting liability as a principal, it was necessary to resolve Rosemond's challenge to the aiding and abetting instruction "because '[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one,'" *id.* at 6a (quoting *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per

curiam)), and the jurors had not been "required to specify under which theory they convicted" Rosemond, *id.* at 5a.

The court rejected Rosemond's argument that the aiding and abetting instruction was erroneous, relying on circuit precedent holding that a defendant need not take "some action to facilitate or encourage his cohort's use of the firearm" to be liable for aiding and abetting a Section 924(c) offense. Pet. App. 9a. Instead, the court emphasized it "'currently only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime.'" *Ibid.* (quoting *Bowen*, 527 F.3d at 1079).

SUMMARY OF ARGUMENT

In the Tenth Circuit, a defendant can be found guilty of aiding and abetting the use of a firearm during and in relation to a drug trafficking crime without a jury ever finding that he intentionally facilitated or encouraged that offense—that is, without finding that he aided or abetted it; it is enough that he participated in the *predicate offense* and learned of the firearm at the moment it was used. That rule is tantamount to strict liability for a defendant's awareness of his confederate's conduct.

The Tenth Circuit's approach is inconsistent with all available evidence regarding the meaning of Section 2. The ordinary understanding of the active verbs in Section 2, which extends liability as a principal to one who "aids, abets, counsels, commands, induces or procures [the] commission" of a crime, is

that they require proof of affirmative action to facilitate or encourage the offense, and that the defendant must intend to do so: "[a]ll of the words used—even the most colorless, 'abet'—carry an implication of purposive attitude." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.). And in enacting Section 2, Congress legislated against the background of centuries of common-law use requiring proof of affirmative acts of facilitation together with proof the defendant acted "with the intention of encouraging" the crime, *Hicks*, 150 U.S. at 448. There is every indication that Congress intended to incorporate this established understanding when it adopted an aiding and abetting "formula" whose "substance * * * goes back a long way." *Peoni*, 100 F.2d at 402; see also 1 Matthew Hale, *The History of the Pleas of the Crown* 615 (Sollom Emlyn ed., London 1736) (law deems as principals those who "doth procure, counsel, command, or abet another to commit a felony").

It is thus settled law, recognized by this Court and every federal court of appeals with criminal jurisdiction, that aiding and abetting liability requires a finding that the defendant (1) affirmatively acted to facilitate or encourage commission of the offense he is accused of aiding and abetting; and that he (2) intended to facilitate or encourage the commission of that offense. Section 924(c) requires proof of a predicate crime of violence or drug-trafficking offense, but it "sets out an offense distinct from the underlying felony." *Castillo*, 530 U.S. at 125 (internal quotation marks omitted). Because "this specific crime—not the [drug trafficking crime]—is the crime that [the defendant] was charged with aiding and abetting,

* * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Medina*, 32 F.3d at 45. Participation in the predicate drug-trafficking crime—indeed, even intentionally facilitating that offense—is not enough to make a defendant liable for the distinct Section 924(c) crime. Cf., *e.g.*, *United States* v. *Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) (conviction for aiding and abetting gambling operation under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals"). The Tenth Circuit's rule would collapse two distinct offenses into one, because it would require no additional acts of intentional facilitation for the separate Section 924(c) offense. That would be tantamount to strict liability, contrary to bedrock principles of aiding and abetting law.

The Tenth Circuit's approach also severs the relationship between culpability and punishment. Under it, a defendant is liable for a mandatory sentence of five years' to life imprisonment under Section 924(c)(1)(A) merely because he "knowingly and actively participated in the drug-trafficking crime"—a crime for which he is separately liable—and "knew his cohort used a firearm" in the commission of that crime, without more. Pet. App. 7a (quoting J.A. 196). It provides the same sentence for a passive participant in a drug deal who learns of the gun's presence only when it is used, and for someone who chose to bring a gun to a drug deal and then chose to use it. There is no reason to believe Congress intended punishment to be so divorced from culpability, particularly given its efforts to graduate punishment under

Section 924(c). Because the ordinary tools of statutory interpretation "fail to establish that the Government's position is unambiguously correct," this Court must "apply the rule of lenity and resolve the ambiguity in [Rosemond's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

Justus Rosemond's Section 924(c) conviction must be reversed. Although the prosecution also attempted to prove Rosemond's direct liability as the shooter of the firearm, the jury returned "a general verdict," which may have rested on the "legally invalid theory" of aiding and abetting. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010). Because there is compelling evidence that someone else (probably Ronald Joseph) was the shooter and that Rosemond neither said nor did anything to facilitate use of the firearm—indeed, there is evidence he *refused* Joseph's request to hide it—it is impossible to "confidently say" that the Tenth Circuit's error "did not contribute to the verdict obtained." *Neder* v. *United States*, 527 U.S. 1, 16-17 (1999).

ARGUMENT

Nearly three-quarters of Justus Rosemond's 14-year sentence stems from his conviction for aiding and abetting the use of a firearm during and in relation to a drug-trafficking crime. See 18 U.S.C. §§ 924(c)(1)(A) and 2. The government was able to secure a mandatory 10-year sentence under Section 924(c) without showing any additional act to facilitate, or intent to facilitate, the use of the firearm. Rather, it was enough to prove Rosemond's participation in the predicate drug trafficking crime (which itself accounts for a separate four-year sentence) plus

just one additional fact: that Rosemond "knew his cohort used a firearm in the drug trafficking crime." Pet. App. 7a. This amounts to having to prove almost nothing at all. As the prosecutor explained to the jury: "[T]he fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it." J.A. 158. According to the Tenth Circuit, once a participant in a drug-trafficking crime uses a gun, all of his cohorts who are present have aided and abetted the use of that firearm, whether or not they facilitated or encouraged—indeed, whether or not they *discouraged*—its use.

Such a sweeping view of accomplice liability might have made sense if Congress had chosen to depart from hundreds of years of common-law practice and hold codefendants strictly liable for the actions of principals without proof of intentional facilitation or encouragement. But there is no indication it did. Indeed, all available evidence indicates Congress incorporated long-established principles of accomplice liability when it enacted the federal aiding and abetting statute. Because there is no dispute that the jury here was never asked to determine that Rosemond intentionally facilitated the use of the firearm, his Section 924(c) conviction must be reversed.

A. Section 2 Requires Proof That The Defendant Acted Intentionally To Facilitate Or Encourage The Offense

It has "long since" been established that criminal liability extends not simply to the person who "actually commit[s] the offense," but that "all present, aiding, and abetting, are equally principal with him."

1 Hale, *supra*, at 437, 615. Thus, the common law deemed principals those who "doth yet procure, counsel, command, or abet another to commit a felony." *Id.* at 615. Aiding and abetting is not "a separate crime," but simply another theory of liability for the substantive offense. *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998) (internal quotation marks omitted).

Today, these basic principles are embodied in the federal aiding and abetting statute, 18 U.S.C. § 2. While that statute, first enacted in 1909, see Act of Mar. 4, 1909, ch. 14, § 332, 35 Stat. 1088, 1152, abolished the "'intricate' distinctions" and procedural accretions that had developed for various types of accessories, *Standefer* v. *United States*, 447 U.S. 10, 15 (1980), it preserved the basic principles of accomplice liability, in language that would be familiar to common-law judges, see *Peoni*, 100 F.2d at 402 (stating of the statute, "[t]he substance of [its] formula goes back a long way"[2]). Section 2 provides in relevant part that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

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[2] At the time of *Peoni*, the statute provided that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U.S.C. § 550 (1934).

1. The Plain Language Of Section 2 Requires Proof Of Intentional Facilitation Or Encouragement

Statutory interpretation must always "start * * * with the language of the statute," giving words their "'ordinary or natural' meaning," *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995), considering "the specific context in which that language is used,'" *McNeill* v. *United States*, 131 S. Ct. 2218, 2221 (2011) (internal quotation marks omitted). Because the text of Section 2 is clear, its language is also the "'end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

The words "aid" and "abet" are universally understood to require that a person act affirmatively to facilitate or encourage the completion of an objective. *E.g.*, *Webster's Third New International Dictionary* 44 (2002) (defining "aid" as "to give help or support to: FURTHER, FACILITATE, ASSIST"); *id.* at 3 (defining "abet" as "to incite, encourage, instigate, or countenance" or "to assist or support in the achievement of a purpose"); *Black's Law Dictionary* 81 (9th ed. 2009) (defining "aid and abet" to mean "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment"); cf. *Abuelhawa*, 556 U.S. at 821 (discussing meaning of "terms like 'aid,' 'abet,' and 'assist,'" and noting that it is "likely that Congress had comparable scope in mind when it used the term 'facilitate,' a word with equivalent meaning"). As one leading treatise explains: "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite * * *. In its legal sense, ['aid and

abet"] means to encourage, advise, or instigate the commission of a crime." 1 Charles E. Torcia, *Wharton's Criminal Law* § 29, at 181 (15th ed. 1993). The meanings of both words have been essentially unchanged since before the predecessor of Section 2 was first enacted.[3]

In addition to requiring an affirmative act or encouragement, "aiding and abetting" connotes an *intent* to bring about the criminal objective; under the ordinary meaning of those words, one can be guilty of aiding and abetting "only if the requisite acts * * * and accompanying mental state are both present." 2 LaFave, *supra*, § 13.1(b). That understanding becomes clearer still when "aid[and] abet[]" are considered in the context of the other verbs listed in Section 2, which extend liability as a principal to one who "counsels, commands, induces or procures [the] commission" of an offense. See *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) ("a word is known by the company it keeps") (internal quotation marks omitted); see also *Beecham* v. *United*

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[3] See, *e.g.*, *Black's Law Dictionary* 56 (1st ed. 1891) (defining "aid and abet" as "doing some act to render aid to the actual perpetrator of the crime"); accord Shumaker & Langsdorf, *supra*, at 41-42; *id.* at 5 (defining "abet" as "[t]o encourage or set another on to commit a crime * * * to command, procure, or counsel him to commit it"); 1 John Bouvier, *Bouvier's Law Dictionary* 125 (Francis Rawle ed., new ed., Boston, Boston Book Co. 1897) (defining "aiding and abetting" as "doing some act to render aid to the actual perpetrator"). General dictionaries from that period reflect a similar understanding. See, *e.g.*, *Webster's Universal Dictionary* A B E (Thomas H. Russell, et al., eds., 1905) (defining "abet" as "[i]n law, to encourage, counsel, incite, or assist in a criminal act").

States, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). All of those verbs require that an actor have acted intentionally to bring about the desired result. See, *e.g.*, *Webster's Third*, *supra*, at 518 (defining "counsel" as "to advise," or "to recommend"); *id.* at 455 (defining "command" as "to direct authoritatively: ORDER, ENJOIN"); *id.* at 1154 (defining "induce" as "to move and lead (as by persuasion or influence)," "prevail upon: INFLUENCE, PERSUADE"); *id.* at 1809 (defining "procure" as "to cause to happen or be done: bring about: EFFECT").

As Learned Hand recognized in his seminal analysis of the statute, "[a]ll the words used—even the most colorless, 'abet'—carry an implication of *purposive attitude*." *Peoni*, 100 F.2d at 402 (emphasis added). It is therefore not enough that the government show that the offense "follow[s] upon the accessory's conduct." *Ibid.* Rather, it is necessary that the defendant "*seek by his action* to make [the offense] succeed." *Ibid.* (emphasis added). In short, Section 2 requires proof of "intentional wrongdoing" with respect to the offense of conviction. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994).

2. *The Historical Understanding Of Aiding And Abetting Confirms That Liability Requires Proof Of Intentional Action To Facilitate Or Encourage The Offense*

The genesis of the terms "aiding and abetting," their "[c]ontemporaneous general usage," *Utah* v. *Evans*, 536 U.S. 452, 475 (2002), and their historic

use "corroborate[]" the understanding, *Golan* v. *Holder*, 132 S. Ct. 873, 885 (2012), that an aider and abettor must act intentionally to facilitate or encourage the offense of conviction. Since its origin in the Old French *aidier*, "aid" has meant "to give help to." *Oxford English Dictionary* 273 (2d ed. 1989); William Caxton, *Cato* a iij b (Westmystre 1483) ("[t]o ayde helpe and Susteyne them in theyr necessytees"); see also John Cowell, *The Interpreter, or Booke Containing the Signification of Words*, at AI (Cambridge, John Legate 1607) (defining "ayde," in relevant part, as "calling in of helpe from another," "to give strength to the party that prayeth in aide of him"). Likewise, from its origins in the Old French *abeter*, "to bait, hound on," *Oxford English Dictionary*, *supra*, at 21, "abet" has required affirmative action urging another to do something. Thus, the term has for centuries "signifieth in our common law * * * to encourage or set on," and "has generally been reserved to describe action with a nefarious purpose." Cowell, *supra*, at AB ("both verbe and noune is alway vsed ["used"] in the euill ["evil"] part"); cf. 1 John Bouvier, *Law Dictionary* 30 (1st ed., Philadelphia, T & J. W. Johnson 1839) ("[Abet] is always taken in a bad sense.").

It is no surprise, then, that when the term "abet" entered the criminal law more than four centuries ago, it denoted intentional action to encourage a crime. The term "abet" often appeared in the company of other verbs denoting intentional action that eventually found their way into Section 2, including "aid." See, *e.g.*, *Parker's Case*, 2 Dyer 186 a., 186 b. (K.B. 1559) ("maliciously and feloniously

counseled, commanded, procured, and abetted" murder); 3 Abraham Fleming, *Holinshed's Chronicles* 1579/2 (London 1587) ("The Scottish queene did not onelie advise them, but also direct, comfort, and abbet them, with persuasion, counsel, promise of reward, an dearnest obtestation."); Hale, *supra*, at 615 ("procure, counsel, command, or abet another to commit a felony"); *John Walker and Mary Rothwell*, Proceedings of the Old Bailey 344-345 (Feb. 26, 1783) ("unlawfully and feloniously, did council, aid, abet, and procure the said John Walker and Mary Rothwell to do, and commit the same").

At common law, it was thus well understood that "aiding and abetting" liability required the defendant to have performed an affirmative act to facilitate or encourage the offense. As an influential 19th Century treatise explained, "aiding and abetting must involve * * * participation" in the offense of conviction; "Mere presence without opposition will not suffice * * *." Henry J. Stephen, *Summary of the Criminal Law* ch.3, at 4 (Philadelphia, J.S. Littell; New York, Halstead & Voorhies 1840); Timothy Walker, *Introduction to American Law* 694 (Philadelphia, P. H. Nicklin & T. Johnson 1837) (defendant must have acted to "assist[]" crime). Nor is it enough that the defendant participated in the criminal venture in some general sense; rather, the prosecution must demonstrate that he had "a *design* to encourage, incite, or in some manner afford aid or consent *to the particular act*." 1 Wharton, *supra*, at 229 (emphasis added); see also 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* § 17, at 889 (Philadelphia, P. Bryne 1806) (discussing liability for

"every person knowingly and wilfully aiding, abetting, or assisting any person or persons to commit any such offenses").

This Court confirmed these two essential elements of aiding and abetting liability in the decade before Congress enacted the predecessor of Section 2. In *Hicks* v. *United States*, *supra*, this Court identified the necessary "condition[s]" for the imposition of aiding and abetting liability. The first was whether the defendant "aided, abetted, or advised, or encouraged" the crime and "in some way contribute[d] * * * by some act done by him, or by some words spoken by him." 150 U.S. at 448. The Court next inquired whether the defendant was present "*for the purpose* of either aiding, abetting, advising, or encouraging" the crime. *Ibid.* (emphasis added). The Court reversed the defendant's conviction for aiding and abetting a murder in part because the trial judge had "omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused *with the intention of encouraging and abetting* [the principal]." *Id.* at 449 (emphasis added). It was not enough, the Court held, that the defendant committed some intentional act—"the intentional use of the words," *ibid.*; instead, to be liable for aiding and abetting, the jury needed to find he had "intention as respects the effect to be produced," *ibid.*, *i.e.*, to facilitate the crime. The Court was unanimous in this respect; the two dissenting Justices agreed that aiding and abetting required intentional action to encourage the offense of conviction. *Id.* at 455 (Brewer, J., dissenting). To them, in fact, that was so obvious

that the instruction was not error: "What is the omission? * * * Does not the word 'abet' imply an intent that the party shall do that which he is abetted to do?" *Ibid.* (citing 1 Bouvier, *supra*, at 39).

3. Section 2 Did Not Alter The Traditional Understanding Of Aiding And Abetting

When "Congress uses a common-law term in a statute, [this Court] assume[s] the 'term * * * comes with a common law meaning, absent anything pointing another way.'" *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011) (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 58 (2007)). Congress gave no indication, when it enacted the predecessor of Section 2, that it did not intend to "incorporate the well-settled meaning'" (*Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quoting *Neder*, 527 U.S. 23) of "aiding and abetting." Congress enacted the federal aiding and abetting statute as part of the nationwide reform of the country's penal laws, with one overarching purpose: to "abolish[] the distinction between principals and accessories" that existed at common law. *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). Doing so simplified the law, eliminating the need to distinguish between certain types of accessories (based on, for example, whether they were "present at the scene of the crime"[4]), see *Standefer*, 447 U.S. at

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[4] At common law,

> In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3)

15, and for special procedural rules for various types of accessories (for example, involving whether an accomplice could be tried separately from the principal, or after his acquittal), *id.* at 18 (citing H.R. Rep. No. 60-2, at 13-14 (1909)).

Although Congress plainly intended to eliminate some of the procedural complexities that attended the distinction between principals and accessories (which the House Committee deemed "obstacles to justice," H.R. Rep. No. 60-2, at 14), there is no indication Congress sought to depart from the well-established understanding of "aiding and abetting" liability. To the contrary, in drafting the statute, Congress employed a well-established "formula" (*Peoni*, 100 F.2d at 402) using a series of words familiar from common-law sources. See, *e.g.*, *Parker's Case*, 2 Dyer 186 a., 186 b. ("counseled, commanded, procured, and abetted"); *John Walker and Mary Rothwell*, 344-345 ("council, aid, abet, and procure"). Indeed, that Congress did not change the historical understanding of the word at a time it made other changes to the law "implicitly ratifie[s]" the previously understood definition. *U.S. Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004); see also *ibid.* (when Congress alters the law but "[does] not change the definition * * * in the statute," that definition is "unaltered by Congress' action"). Indeed, the provision's sponsors understood that the statutory

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accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

Standefer, 447 U.S. at 15.

definition "does not differ in effect" from the "definition at common law." 42 Cong. Rec. 1374 (1908) (exchange between Sen. Bacon and Sen. Heyburn); see also *State* v. *Bogue*, 34 P. 410, 412 (Kan. 1893) (saying that an analogous state statute "d[id] not in any manner enlarge or diminish the essential elements of criminality," but "merely d[id] away with a somewhat arbitrary [common-law] nomenclature").[5]

This Court and others have indicated that common law practice is centrally relevant to the scope of accomplice liability under Section 2 and its predecessor. In *Standefer*, 447 U.S. at 21, for example, this Court relied on the common-law understanding in concluding acquittal of the principal did not bar an aiding and abetting conviction. And *Peoni* reviewed common-law practice in determining the showing necessary to convict a person of aiding and abetting under an earlier version of the provision.

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[5] Although Congress has made a handful of minor changes to the provision over the years, there is no indication any of them was designed to disturb the understanding of what constitutes aiding and abetting. In 1948, Congress removed the adverb "directly" ("[w]hoever directly commits any act constituting an offense defined by any law of the United States") and recodified the provision at its present location. Act of June 25, 1948, ch. 645, § 2(b), 62 Stat. 683, 684. In 1951, Congress again amended § 2 to "make a few improvements of a minor character," S. Rep. No. 82-1020, at 7-8 (1951), replacing the phrase "is a principal" in § 2(a) and similar language in § 2(b) with the phrase, "is *punishable as* a principal," Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717 (emphasis added). See generally *Standefer*, 447 U.S. at 18 n.11. In the decades since, Congress has not sought to amend the statute to depart from the accepted meaning of "aiding and abetting."

100 F.2d at 402; see also *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (adopting *Peoni* standard); *Abuelhawa*, 556 U.S. at 821 (noting traditional understanding of "terms like 'aid,' 'abet,' and 'assist,'" in interpreting "'facilitate,' a word with equivalent meaning").

Although the government now contends that a defendant facilitates a firearm offense when he "knowingly benefit[s] from the protection afforded by the firearm," Br. in Opp. 12 (internal quotation omitted), it is impossible to square the passive receipt of some "benefit" from the use of a firearm with Section 2's active language requiring proof of intentional facilitation. Indeed, that argument has the required showing *backwards*: Instead of proving that the defendant facilitated use of the firearm, the government argues the correct inquiry is whether the firearm facilitated the defendants in committing the predicate offense.

B. Bedrock Principles Require Proof That A Section 924(c) Defendant Acted Intentionally To Facilitate Or Encourage The Use Of The Firearm

Generally recognized principles of aiding and abetting law confirm what is already plain from the text of Section 2 and historical practice. The great weight of judicial authority, both from this Court and others, establishes that aiding and abetting a Section 924(c) firearm offense requires a finding the defendant has acted intentionally to facilitate or encourage the use of the firearm.

1. The Canonical Definition Of Aiding And Abetting Requires An Intentional Act To Facilitate Or Encourage The Offense

Judge Learned Hand's opinion in *Peoni* is widely regarded as establishing the "canonical definition of aiding and abetting a federal offense." *United States* v. *Ortega*, 44 F.3d 505, 507 (7th Cir. 1995). After examining the text of the federal aiding and abetting statute in the context of common-law practice, he explained that a defendant is liable for aiding and abetting an offense if he "associate[s] himself with the venture, * * * participate[s] in it as in something that he wishes to bring about, that he *seek[s] by his action* to make it succeed." 100 F.2d at 402 (emphasis added). This Court has embraced that formulation time and again. See *Cent. Bank of Denver*, 511 U.S. at 190; *Nye & Nissen*, 336 U.S. at 619.

This test establishes that aiding and abetting consists of two essential elements: first, the defendant must have taken an affirmative act to facilitate or encourage commission of the offense he is accused of abetting; second, the defendant must have *intended* to facilitate or encourage the commission of that offense. As this Court explained, Section 2 "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Cent. Bank of Denver*, 511 U.S. at 181; see also *id.* at 190 (indicating offense requires "intentional wrongdoing"). That two-part test has been widely embraced. See 2 LaFave, *supra*, § 13.2 ("[O]ne is liable as an accomplice to the crime of another if he

(a) ga ssistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime."); Model Penal Code § 2.06(3) (West 2013) (requiring the person "solicit[]" or "aid[] or agree[] or attempt[] to aid such other person in planning or committing" an offense "with the purpose of promoting or facilitating the commission of the offense").

Although the Tenth Circuit has adopted a distinct, uniquely expansive conception of accessory liability in the Section 924(c) context, see pp. 35-42, *infra*, every federal court of appeals has recognized as a general matter that under Section 2, "[a]iding and abetting has two components: an act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission." *United States* v. *Searan*, 259 F.3d 434, 444 (6th Cir. 2001).[6] Most circuits' general accomplice-liability pattern jury instructions likewise require proof of

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[6] *E.g.*, *United States* v. *Loder*, 23 F.3d 586, 590-591 (1st Cir. 1994); *Medina*, 32 F.3d at 45; *United States* v. *Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States* v. *Arrington*, 719 F.2d 701, 705 (4th Cir. 1983); *Sorrells*, 145 F.3d at 753; *United States* v. *Carter*, 695 F.3d 690, 697 (7th Cir. 2012); *United States* v. *Santana*, 524 F.3d 851, 853 (8th Cir. 2008); *United States* v. *Nelson*, 137 F.3d 1094, 1103-1104 (9th Cir. 1998); *United States* v. *Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999) (defendant must "seek to make the [criminal] venture succeed through some action of his own") (internal quotation marks omitted); *United States* v. *Capers*, 708 F.3d 1286, 1306-1307 (11th Cir.), petition for cert. filed, No. 12-10635 (June 2013); *United States* v. *Wilson*, 160 F.3d 732, 738 (D.C. Cir. 1998).

these two facts.[7] Indeed, these two basic elements are so widely accepted that the Department of

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[7] See, *e.g.*, Pattern Crim. Jury Instructions Drafting Comm., *Pattern Crim. Jury Instructions for the Dist. Courts of the First Circuit* § 4.18.02(a) & cmt. (D. Me. 2013) (government must show defendant "participated in [the crime]" and "intended to help [the principal]"); Comm. on Model Crim. Jury Instructions for the Third Circuit, *Crim. Jury Instructions* § 7.02 (2013) (must show defendant "did some act for the purpose of [aiding] [assisting] [soliciting] [facilitating] [encouraging]" principal "in committing the specific offense(s) charged and with the intent" that the principal "commit that [those] specific offense(s)," and that the defendant's "acts did, in some way, [aid,] [assist,] [facilitate,] [encourage,]" the principal "to commit the offense(s)") (brackets in original); Comm. on Pattern Jury Instructions Dist. Judges Ass'n, Fifth Circuit, *Pattern Jury Instructions (Crim. Cases)* § 2.06 (2012) (must show "the defendant shared the criminal intent of the principal" and "engaged in some affirmative conduct designed to aid the venture or assist the principal"); Sixth Circuit Comm. on Pattern Crim. Jury Instructions, *Pattern Crim. Jury Instructions* § 4.01 (2013) (government must prove "that the defendant helped to commit the crime [or encouraged someone else to commit the crime]" and "intended" to do so) (brackets in original); Comm. on Fed. Crim. Jury Instructions for the Seventh Circuit, *Pattern Crim. Jury Instructions for the Seventh Circuit* § 5.06 (2012) (requiring proof that the defendant "knowingly [aids; counsels; commands; induces; or procures] the commission of an offense" and "tr[ies] to make [the offense] succeed") (first brackets in original); Judicial Comm. on Model Jury Instructions for the Eighth Circuit, *Manual of Model Crim. Jury Instructions for the District Courts of the Eighth Circuit* § 5.01 (2013) (defendant must "have knowingly acted" "for the purpose of [causing] [encouraging] [aiding]" the offense) (brackets in original); Ninth Circuit Jury Instructions Comm., *Manual of Model Crim. Jury Instructions* § 5.1 (2010) (government must prove "the defendant knowingly and intentionally aided, counseled, commanded, induced or procured [the principal] to commit each element of" the offense with

Justice's *Criminal Resource Manual*, which serves as guidance to U.S. Attorneys, unequivocally states that "[t]he elements necessary to convict under [an] aiding and abetting theory" include "[t]hat the accused had specific intent to facilitate the commission of a crime by another" and "the accused assisted or participated in the commission of the underlying substantive offense," meaning they "acted in some affirmative manner designed to aid" it. *Criminal Resource Manual* § 2474; *id.* §§ 2475, 2478 (requires showing "the defendant engaged in some affirmative conduct designed to aid" the offense; "[a]ll courts seem to agree that aiding and abetting requires specific intent, also described as 'purposive attitude'").[8]

2. Aiding And Abetting A Section 924(c) Offense Requires An Intentional Act To Facilitate Or Encourage The Use Of The Firearm

As the "vast majority" of courts of appeals have concluded, Pet. App. 10a, applying these accepted principles of accomplice liability to Section 924(c) requires the government to prove that (1) the

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"intention of helping that person commit" the offense); Crim. Pattern Jury Instruction Comm. of the U.S. Court of Appeals for the Tenth Circuit, *Crim. Pattern Jury Instructions* § 2.06 (2011) (requiring that the defendant "intentionally participated in" the crime and "intended to help [principal]").

[8] Accord *United States* v. *Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004); *United States* v. *Otero-Mendez*, 273 F.3d 46, 52 (1st Cir. 2001); *United States* v. *Irorere*, 228 F.3d 816, 823 (7th Cir. 2000); *United States* v. *Andrews*, 75 F.3d 552, 555 (9th Cir. 1996); *United States* v. *Willis*, 38 F.3d 170, 177 n.7 (5th Cir. 1994).

defendant acted to facilitate or encourage the use of a firearm in the predicate drug trafficking crime; and (2) the defendant intended to facilitate or encourage the commission of that offense. The Tenth Circuit's (and the government's) rule fails to require either an act of facilitation or an intent to facilitate the use of the firearm. Accordingly, it is invalid.

Section 924(c)(1)(A) provides, in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm * * *, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime [receive a specified mandatory minimum penalty] * * *.

Section 924(c) establishes a separate, freestanding offense that is "distinct from the underlying federal felony," *Simpson* v. *United States*, 435 U.S. 6, 10 (1978), and does not merely create an enhanced penalty for the underlying crime, *Castillo*, 530 U.S. at 125. A Section 924(c) offense "contain[s] two distinct conduct elements"—"the 'using and carrying' of a gun and the commission of [the violent or drug-trafficking crime]." *Rodriguez-Moreno*, 526 U.S. at 280. Thus, to convict a person of this offense as a principal, the prosecution must prove that (1) the defendant "committed all the acts necessary to be subject to punishment for * * * a crime of violence [or drug trafficking crime] in a court of the United States";

and (2) he "used a firearm" and did so "'during and in relation to' [the drug trafficking crime]." *Ibid.*

When a defendant is charged with aiding and abetting a firearm offense under Section 924(c), the intentional act of facilitation or encouragement required by Section 2 must be directed at the use of the firearm during and in relation to the drug-trafficking crime—*not* merely to facilitating or encouraging the predicate drug offense—because "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the [drug trafficking] crime." *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997). Because an aider and abettor "is punished as a principal for 'using' a firearm . . . therefore [he] must facilitate in *the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation*." *United States* v. *Lopez-Urbina*, 434 F.3d 750, 758 (quoting *Sorrells*, 145 F.3d at 754) (alterations in *Lopez-Urbina*); accord *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999); *Bazemore* v. *United States*, 138 F.3d 947, 949-950 (11th Cir. 1998); *Nelson*, 137 F.3d at 1103-1104; *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *Medina*, 32 F.3d at 45. And because "[i]t is the aider and abettor's state of mind, rather than the state of mind of the principal, that determines the former's liability," the jury may only convict if it "find[s] that [the alleged accomplice] knew that [the principal] was armed and intended to use the weapon, and intended to aid him in that respect." *United States* v. *Short*, 493 F.2d 1170, 1172 (9th Cir. 1974) (discussing 18 U.S.C. § 2113(a) of-

fense). Thus, it is the use of the firearm during the violent or drug trafficking crime, rather than the predicate offense simpliciter, that the defendant must have "participate[d] in" and "[sought] by his action to make * * * succeed." *Peoni*, 100 F.2d at 402.

Applying this reasoning, the Second Circuit overturned a Section 924(c) conviction where the defendant "learned that [the principal] intended to carry a gun" during an armed robbery, but the government presented no evidence that the defendant "prompted or induced him to do so." *Medina*, 32 F.3d at 45. Judge Jacobs, writing for the court, reasoned that the principal was charged with "using or carrying a firearm during and in relation to a crime of violence," and that because "[t]his specific crime—not the robbery—is the crime that [the defendant] was charged with aiding and abetting * * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Ibid.* The court rejected the contention that the defendant could be convicted as an aider and abettor "merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the robbery itself," explaining that "the language of the statute requires proof that he performed some act that directly facilitated or encouraged *the use or carrying of a firearm*." *Ibid.* (emphasis added).

Similarly, the Ninth Circuit reversed the conviction of a defendant who "participated in [a] robbery *knowing a gun would be used*" because there was "no evidence that [the defendant] directly facilitated or encouraged the use of the firearm." *Nelson*, 137 F.3d

at 1104 (emphasis added). Writing for the court, Judge Hall reasoned that "[t]he prosecution must still prove a specific intent to aid the firearms crime, and some act that facilitates or encourages that crime." *Id.* at 1103 (citation omitted).

3. The Tenth Circuit's Rule Violates Fundamental Principles Of Aiding And Abetting Liability

The Tenth Circuit's rule requires no showing that the defendant "took some action to facilitate or encourage his cohort's use of the firearm," much less that he did so "intentionally." Pet. App. 9a. Instead, that court "'only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime.'" *Ibid.* (quoting *Bowen*, 527 F.3d at 1079). So relaxed is this standard that it imposes Section 924(c) liability for "using" a firearm based on simple awareness of it; as the government argued at trial, "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it." J.A. 158. In effect, the Tenth Circuit's rule collapses any distinction between the defendant's role in the predicate offense and his role in aiding and abetting the use of a firearm during and in relation to that offense. The Tenth Circuit adopted this faulty standard virtually without analysis in *United States* v. *Wiseman*, 172 F.3d 1196, 1217 (10th Cir. 1999), and has never undertaken to explain why it is unnecessary to show proof the defendant intentionally facilitated the crime of conviction. See Pet. App. 7a-8a (reviewing development of case law).

a. The Tenth Circuit's Rule Fails To Require Proof Of The Two Essential Elements Of Aiding And Abetting

The government contends that the instruction given below was correct. See Br. in Opp. 8. A Section 924(c) offense, it argues, requires proof of two elements: (1) use or carrying of a firearm; and (2) that "the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'" *Ibid.* (internal quotation marks omitted). The government's position relies critically on the proposition that "[w]hen a person actively participates in the predicate crime of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense." *Ibid.* That is nonsense. Participation in the predicate offense may establish a condition necessary for the penalties of Section 924(c) to apply, but in no sense does bare participation in that crime "aid" or "encourage" "'the use or carrying' [of the firearm] * * * 'during and in relation to' * * * [that] crime." *Ibid.*

The government next contends that when a defendant participates in the predicate crime of violence or drug trafficking crime "with the knowledge of the principal's use or carrying of a firearm during the commission of the crime, he has plainly 'participate[d] in [the Section 924(c) offense] as in something that he wishe[d] to bring about." Br. in Opp. 8-9 (quoting *Cent. Bank of Denver*, 511 U.S. at 190). But simply because a defendant has intentionally participated in the predicate violent or drug-trafficking offense does not mean he has had the requisite involvement in the "distinct" crime

(*Castillo*, 530 U.S. at 125) of using a firearm during and in relation to that offense. Proof of a predicate violent or drug-trafficking offense is a necessary part of establishing Section 924(c) liability; that does not mean that intentional participation in that predicate offense necessarily constitutes intentional facilitation of the separately defined Section 924(c) crime. Cf., *e.g.*, *United States* v. *Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) (conviction for aiding and abetting gambling operation under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals").

The government's theory would expand criminal liability dramatically. For example, because a drug sale can be part of a "continuing criminal enterprise," 21 U.S.C. § 848, the government's theory would permit imposition of draconian "drug kingpin" liability on someone who participated in a single predicate act knowing that others had engaged in additional predicate transactions, but who himself never intended (or acted) to facilitate the larger "enterprise." But see *United States* v. *Pino-Perez*, 870 F.2d 1230, 1231 (en banc) ("The venture in a kingpin case is, of course, the continuing criminal enterprise. It is *that* enterprise which [a defendant] would have to be found to have associated with, participated in, and sought by his action to make succeed, in order to be punishable as an aider and abettor."); Sharon C. Lynch, Comment, *Drug Kingpins and Their Helpers: Accomplice Liability under 21 USC Section 848*, 58 U. Chi. L. Rev. 391, 414 (1991) ("The intentional aid sufficient to impose accomplice liability must be

assistance intended to aid the [continuing criminal enterprise] itself, not simply an intent to have particular transactions with the CCE succeed."); cf. also *United States* v. *Amen*, 831 F.2d 373, 382 (2d Cir. 1987) (holding accomplice liability is not available under kingpin statute). Nothing in the text or history of Section 2 suggests that Congress intended accomplice liability to sweep so far.

b. The Tenth Circuit's Rule Conflates Two Distinct Offenses

Accepting the Tenth Circuit's (and the government's) rule would collapse two distinct offenses into one—there would be no difference between the intent and action necessary to establish the separate offenses of aiding and abetting the use of a firearm during and in relation to a drug-trafficking crime, and simply aiding and abetting the drug crime. That rule requires no finding of any act of intentional facilitation of the distinct firearm offense. Rather, both the act of facilitation and the intent to facilitate would be inferred from a defendant's "knowing[] and active[] participat[ion] in the drug trafficking crime." Pet. App. 7a. But that at most shows intentional facilitation of *the drug offense*, which is separately defined and punished, see, *e.g.*, 21 U.S.C. § 841. See generally *United States* v. *Peñaloza-Duarte*, 473 F.3d 575, 578 (5th Cir. 2006) ("'Participation' means that the defendant engaged in some affirmative conduct designed *** to assist the perpetrator of the crime."); *Criminal Resource Manual* § 2478 (same). The rule requires proof of only *one fact* apart from that required to establish the predicate crime, one fact to trigger a consecutive mandatory sentence of between

five years' imprisonment and life imprisonment without parole: that the defendant "knew" (from his presence at the scene) of a confederate's firearm use "in th[e] underlying crime." Pet. App. 8a (internal quotation marks omitted).

Because aiding and abetting a Section 924(c) violation is a distinct offense from aiding and abetting a drug trafficking crime, it stands to reason that courts would "require discrete proof of the accomplice's intentional abetment" of the additional fact "that by itself imposes an additional criminal offense"—use of a firearm. *United States* v. *Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002) (O'Scannlain, J.); see also *Sorrells*, 145 F.3d at 753-754 (holding that the defendant must "perform[] some affirmative act *relating to the firearm*" and "share in the criminal intent *to use the firearm*") (emphasis added) (internal quotation marks omitted). It is the use of the firearm for which the defendant is punished, *Sorrells*, 145 F.3d at 754; thus, it is the use of the firearm that the defendant must have "participate[d] in" and "[sought] by his action to make * * * succeed." *Peoni*, 100 F.2d at 402.[9]

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[9] The government contends that action or intent to facilitate use of a firearm is unnecessary because "'[t]o be convicted of aiding and abetting, participation *in every stage of an illegal venture* is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.'" Br. in Opp. 8 (quoting *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir. 1998) (internal quotation marks omitted). But saying that a defendant need not "participate in every stage" is not the same as saying that a defendant need not facilitate the offense of conviction so long as he facilitates some other offense. *Wilson* is not to the contrary.

c. The Tenth Circuit's Rule Is Tantamount To Strict Liability

As the government itself has acknowledged, "mere presence at the crime scene and guilty knowledge of the crime are generally not enough for aiding and abetting." *Criminal Resource Manual* § 2478; see also *ibid.* ("More is needed than simply knowledge that the crime was to be committed. Awareness of the crime is insufficient to establish aiding and abetting.") (citations omitted); see also *United States* v. *Gaskins*, 690 F.3d 569, 579 n.4 (D.C. Cir. 2012) ("'mere negative acquiescence . . . in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting'") (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). "Aiding and abetting * * * requires conduct of an affirmative nature." *United States* v. *Grey Bear*, 828 F.2d 1286, 1293 (8th Cir. 1987). While the Tenth Circuit rule requires proof of involvement in the predicate violent or drug-trafficking crime, "mere presence at the crime scene" and knowledge of the firearm suffices to trigger liability for the distinct crime of Section 924(c). The Tenth Circuit's rule contravenes basic principles of accomplice liability. "Under the general principles

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There, the court of appeals found it unnecessary that a defendant himself beat the victim to "aid and abet" the beating, noting that he had helped the principals gain access to the victim and had stated in the presence of the principals that the victim deserved to be beaten. 135 F.3d at 305. From that the court easily concluded that the defendant had acted and "had the requisite intent to 'bring about' the pistol whipping of [the victim]." *Ibid.*

applicable to accomplice liability, *there is no such thing as liability without fault.* Thus, it is not enough that the alleged accomplice's acts in fact assisted or encouraged the person who committed the crime"—the defendant must have intended to do so. 2 LaFave, *supra*, § 13.2(f) (emphasis added); accord *Hicks*, 150 U.S. at 449.

In the Tenth Circuit, the defendant is liable *even if* he did not intend for the firearm to be used and did nothing to facilitate or encourage it—indeed, the defendant would be liable even if he discouraged or sought to prevent its use. That is a far cry from requiring that the defendant "'wishe[d] to bring about'" the firearm offense and "'[sought] by his action to make [the offense] succeed.'" *Nye & Nissen*, 336 U.S. at 619 (quoting *Peoni*, 100 F.2d at 402). Rather, it is tantamount to "strict liability." *United States* v. *Morrow*, 977 F.2d 222, 233-234 (6th Cir. 1992) (Martin, J., dissenting).

The government seeks to apply acts of facilitation and intent directed at a drug trafficking offense—an offense of which Rosemond was separately convicted as a principal and sentenced—to a *distinct* firearm offense carrying a separate (and severe) penalty. But there is no precedent for allowing a person to be convicted of aiding and abetting one offense based on proof he intentionally facilitated *a different* offense. General principles of criminal liability prohibit using intent to aid in the commission of *one* offense as a substitute for intent to aid in the commission of a *separate* offense. Cf. *Hill*, 55 F.3d at 1202 (conviction for aiding and abetting gambling operation under Section 1955 requires "intent * * * to assist the

gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals"); *Pino-Perez*, 870 F.2d at 1231 (defendant must have "sought by his action to make" the *continuing criminal enterprise* succeed, not simply the predicate acts); see also *United States* v. *Martiarena*, 955 F.2d 363, 367 (5th Cir. 1992) (evidence of intent to aid avoiding the filing of currency and money instrument report not sufficient to prove intent to aid avoidance of separate currency transaction report).

C. The Tenth Circuit's Rule Severs The Required Connection Between Culpability And Punishment

It is a "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (internal quotation marks omitted). The Tenth Circuit's rule violates that basic precept because it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal; it is also contrary to Congress's evident purpose in enacting that statute, which imposes severe, but *graduated*, penalties based on the specific conduct of each defendant. See *Castillo*, 530 U.S. at 121.

When Congress enacted the federal aiding and abetting statute in 1909, it abolished common law distinctions between principals and accessories. *Standefer*, 447 U.S. at 18-19. But implicit in that decision was the understanding that those who would be sentenced as aiders and abettors would be equally

deserving of punishment as those who actually "'commit'" the offense. *Id.* at 18 (quoting Section 2). Because the Tenth Circuit's rule does not require that the defendant acted intentionally to facilitate or encourage the use of a firearm, it subjects defendants to Section 924(c) liability without a showing of the sort of "direct participation" in the offense of conviction that would be necessary to be liable as a principal. The government can trigger Section 924(c) liability by proving just one fact beyond those necessary to establish the predicate drug offense: that the defendant "knew his cohort" used a firearm—even if the defendant first became aware of the gun only at the moment it was discharged.[10] See p. 35, *supra*. Indeed, the defendant would be liable

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[10] The government concedes that in the Tenth Circuit, "*advance* knowledge" that the principal has a firearm is not necessary to support an aiding and abetting conviction, Br. in Opp. 9, but argues that "[a] defendant cannot be convicted under the court of appeals' rule unless he had knowledge of the firearm before the underlying crime was *completed*." *Id.* at 9-10. While it is hornbook law that one cannot aid and abet a completed offense, 2 LaFave, *supra*, § 13.2(a), at 341 n.36, nothing in the Tenth Circuit's statement of its rule, see Pet. App. 7a-8a, or its cases implementing it imposes such an explicit requirement. The government contends that "it is clear that petitioner continued to participate in the drug trafficking offense after the discharge of the firearm through his subsequent pursuit of Gonzales." Br. in Opp. 10 n.2; see also *id.* at 15. But that is not an argument the government ever submitted to the jury, much less one the jury necessarily accepted. It also turns on the government's characterization as "pursuit" a passenger's failure to jump out of a car after its driver "took off at a high rate of speed." J.A. 42, 49.

based on his knowledge alone even if he discouraged or sought to prevent its use. See p. 41, *supra*.

As the government emphasized in this case, the requisite knowledge can routinely be inferred because, when a person is "present at a drug deal when shots are fired," he "simply can't" lack awareness of that single enhancing fact under such circumstances. J.A. 158. But that is too slender a reed on which to base such a significant sentencing increase. As the Fifth Circuit reasoned,

> [A] defendant's knowledge * * * that a gun will be used in the commission of the underlying offense is not sufficient to sustain a conviction; there must be evidence that the defendant took some action to facilitate or encourage the use or carrying of a firearm. 'The link to the firearm is necessary because the defendant is punished as a principal for 'using' a firearm . . . and therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)(1) violation.'

Lopez-Urbina, 434 F.3d at 758 (quoting *Sorrells*, 145 F.3d at 754). "To ensure that the accomplice and the principal possess the same moral culpability, it is only just to require the accomplice to have the mens rea to aid" the *offense of conviction* rather than a predicate offense. *Hill*, 55 F.3d at 1202. Without that crucial link, the government can obtain Section 924(c) liability for the distinct firearm offense based on culpability for the predicate offense—which would never suffice to establish Section 924(c) liability as a principal.

This case vividly illustrates how the Tenth Circuit's rule divorces culpability from punishment. The Section 924(c) conviction increased Rosemond's sentence from four years of imprisonment to *fourteen*, simply because he "knew his cohort" used a firearm, see Pet. App. 7a-9a, although there was no jury finding of any actual act to facilitate or encourage the gun's use—indeed, the evidence is consistent with simple passivity throughout the drug sale and the shooting, and a desire *not* to facilitate its use, see p. 53, *infra*. The Tenth Circuit's rule therefore imposes the same punishment on a person who passively sits through a transaction as it does on the person who affirmatively chooses to fire a deadly weapon at others: It permits a supposed accessory to be punished for conduct substantially less culpable than that of the principal.

Nothing in Section 2 or Section 924(c) evinces Congress's intent to establish that novel—and wildly expansive—concept of accomplice liability. As the government has acknowledged, "Section 924(c)(1) punishes only one who chooses to commit a serious crime *and* chooses to use or carry a gun during and in relation to that crime." Reply Br. for the United States at 5, *United States* v. *Rodriguez-Moreno* (No. 97-1139). "Congress used no language spelling out a purpose so improbable" as imposing severe Section 924(c) sentences on defendants with such an attenuated relationship to the offense, "but legislated against a background usage of terms such as 'aid,' 'abet,' and 'assist' that points in the opposite direction." *Abuelhawa*, 556 U.S. at 824. "[I]t is impossible to believe that Congress intended" such an

weak connection to the use of a firearm "to cause [a] quantum leap in punishment." *Id.* at 822-823.

The government contends that "those who actively participate in drug deals, robberies, or other violent crimes with the knowledge that an accomplice has brought along a firearm" are "equally deserving of punishment as principals under Section 924(c)." Br. in Opp. 9 (internal quotation marks omitted). There are two possible explanations for that statement, and both are bad. The first is that the government, while wanting to avoid any *jury finding* that the defendant intentionally facilitated the firearm's use, wants courts *simply to assume* that the defendant intended to facilitate use of the firearm and "[did] some act to render aid." Shumaker & Langsdorf, *supra*, at 41-42. But "courts have the responsibility" in applying principles of accomplice liability "to make sure that mere speculation is not permitted to substitute for proof." *United States* v. *Kelton*, 446 F.2d 669, 671 (8th Cir. 1971) (internal quotation marks omitted).

The other possible explanation is no better. It is that, lacking any compelling *legal* arguments for why a defendant should be punished as a principal for aiding and abetting an offense he neither intended to facilitate nor did facilitate, the government is simply appealing to a sense of rough justice: people who commit crimes at which a gun is present, like the people who actually choose to use guns to facilitate their crimes, or intentionally facilitate the use of guns in a crime, should not be heard to object to the "severe penalties of § 924(c)." *Busic*, 446 U.S. at 404

n.9.[11] But those who do not intentionally act to facilitate the use of a firearm at a crime are "clearly less culpable than those directly participating in the crime." 2 LaFave, *supra*, § 13.2(d). That understanding is borne out by the Sentencing Guidelines, which, for example, provide a relatively modest 2-level increase for defendants who participate in drug offenses knowing their codefendants will be armed (or when that is foreseeable).[12] Application of that enhancement here would have increased Rosemond's advisory sentencing range a maximum of 18 months (from 70-87 to 84-105 months; the district judge sentenced Rosemond well below the Guidelines), a far cry from the consecutive mandatory minimum *120-month* sentence prescribed here by Section 924(c)—more than a six-fold increase.

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[11] An alternatively explanation is that this statement embodies the idea that "a person cannot knowingly benefit from the protection afforded by the firearm carried by his companion and then subsequently evade criminal liability for its presence." Br. in Opp. 12 (internal quotation marks omitted). But, without more, simply "benefit[ting]" from the use of a firearm does not involve intentional facilitation of the principal's use of the weapon, see p. 27, *supra*, and is adequately punished by a sentencing enhancement to the predicate violent or drug-trafficking crime.

[12] *E.g.*, *United States* v. *Miles*, 346 F. App'x 993, 994 (5th Cir. 2009) (per curiam) (enhancement appropriate where "there is evidence that Miles's coconspirator possessed a firearm during the course of the [drug] conspiracy and that Miles saw and heard about the coconspirator's gun"); *United States* v. *Emerson*, 501 F.3d 804, 815 (7th Cir. 2007) (enhancement appropriate where recording indicated coconspirator discussed his gun with defendant while planning crime).

The government's description of the deterrent effect the Tenth Circuit's rule purportedly serves makes plain that it does not really address aiding and abetting Section 924(c) so much as it does the predicate drug trafficking crime. As the government notes, "the chief legislative objective of * * * Section 924(c) is 'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" Br. in Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)). But because the Tenth Circuit's rule sweeps in those who have no involvement in encouraging or facilitating the use of a firearm, that incentive has no application here. Instead, the rule encourages the defendant "to leave hi[mself] at home." *Ibid.* As the government puts it, the Tenth Circuit's rule "deter[s]" people "from *participating in the criminal enterprise* when they know of their confederate's use * * * of a firearm." *Ibid.* (emphasis added). While the government's use of the vague term "criminal enterprise" obscures the effect of the Tenth Circuit's rule, the "criminal enterprise" refers to the predicate drug trafficking offense, the only "criminal enterprise" the defendant has been found to "participate[] in." Pet. App. 7a. But deterring *that* offense is the work of 21 U.S.C. § 841 and the associated Guidelines' firearms enhancement, not Section 924(c), which is a "distinct" crime and "not simply a penalty provision." See *Castillo*, 530 U.S. at 125. It is no justification for an unprecedented, expansive interpretation of aiding and abetting liability.

D. The Rule Of Lenity Mandates Requiring Proof That A Section 924(c) Defendant Intentionally Facilitated Or Encouraged The Firearm's Use

If the plain language of Section 2, the centuries-old common-law understanding of the requirements for "aiding and abetting" liability, and the circumstances surrounding the passage of the provision and its legislative history "fail to establish that the Government's position is unambiguously correct," *Granderson*, 511 U.S. at 54, then this Court must "apply the rule of lenity and resolve the ambiguity in [Rosemond's] favor." *Ibid.* It is well established that, "when there are two rational readings of a criminal statute, one harsher than the other," this Court will "choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). In light of the language of Section 2, the established common-law understanding, and rejection by the "vast majority" (Pet. App. 10a) of circuits, it is plain that, at a minimum, the government's view is not "unambiguously correct."

As discussed above, see pp. 36-38, *supra*, the Tenth Circuit's conception of aiding and abetting liability relieved the government from proving that Rosemond took *any* affirmative act to facilitate the criminal activity he allegedly aided and abetted—the use of a firearm during and in relation to a drug-trafficking offense. That rule relies on a novel conception of aiding and abetting liability: "if the rule of lenity * * * means anything, it means that the familiar meaning of [a statute's] word[s] * * * should

be preferred to the vague and obscure." *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 n.8 (2003). To accept the government's reading would require a novel application of "aiding and abetting," "subject[ing] [defendants] to punishment that is not clearly prescribed" by the statute. *United States* v. *Santos*, 553 U.S. 507, 514 (2008). If Congress had meant to take such an expansive view of aiding and abetting liability, "it would have spoken more clearly"; absent that, "the rule of lenity * * * counsel[s] in favor of an interpretation of the statute that does not reach so broadly." *Sekhar*, 133 S. Ct. at 2730 (Alito, J., concurring).

Aside from the unfairness of punishing someone for conduct that is not clearly proscribed, there is another good reason why this Court construes a criminal statute in favor of the defendant when the government's reading fails to be "unambiguously correct," *Granderson*, 511 U.S. at 54: Doing so "keeps courts from making criminal law in Congress's stead" and "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 553 U.S. at 514. Congress has shown itself more than capable of taking action when it concludes Section 924(c) has been interpreted too narrowly. See, *e.g.*, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (amending 18 U.S.C. § 924(c)(1) to abrogate the holding of *Bailey*, *supra*, by expanding the scope of Section 924(c)). Absent stronger indication that Congress meant to apply aiding and abetting liability so broadly, the statute should be interpreted to require proof the defendant

intentionally facilitated or encouraged the use of a firearm.

E. Rosemond's Section 924(c) Conviction Must Be Reversed

It is well settled that a verdict is constitutionally infirm where a jury is instructed on alternative theories of guilt and returns "a general verdict that may rest on a legally invalid theory." *Skilling*, 130 S. Ct. at 2934 (citing *Yates* v. *United States*, 354 U.S. 298 (1957)). Reversal is therefore required unless the government proves the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). To determine whether the government has met that "strict" standard, *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam), the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). Rather, it involves whether "the guilty verdict actually rendered in this trial was *surely unattributable* to the error." *Ibid.* (emphasis added).

Error may be harmless, for example, when a jury is not asked to find an element "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. Because Rosemond's involvement in the Section 924(c) offense was hotly contested, and "the record contains evidence that could rationally lead to a * * * finding" that Rosemond *did not* intentionally facilitate or encourage use of the firearm, *id.* at 19, it is impossible to "confidently say" that the Tenth Circuit's error "did not contribute to the verdict

obtained," *id.* at 16, 17 (internal quotation marks omitted). Rosemond's Section 924(c) conviction cannot stand.

To begin with, there is no serious question that the jury could rationally conclude that Rosemond was not the shooter. The *only* eyewitnesses who saw the firearm discharged, who concededly "got a good view of the parking lot" (J.A. 146), said that a single man stepped from the *driver's* side of the car to fire the pistol. J.A. 39, 41-42, 48. That is the position that both buyer Ricardo Gonzales and confederate Ronald Joseph testified *Joseph* occupied during the transaction, J.A. 92-93, 98, 126, see also J.A. 123 (Joseph testifies petitioner shot from *passenger's* side of vehicle), and it was the rear-seat passenger Gonzales punched before fleeing out the driver's side door, J.A. 95-96. Although Perez initially told police that Rosemond—a stranger to her, J.A. 100—committed the shooting rather than her boyfriend's nephew Joseph (whom she had known for months, J.A. 115-116), she recanted that testimony at trial, after her relationship with his uncle had ended, see J.A. 112-113, 119. There is a reason the jury sought clarification of the standards for aiding and abetting liability, see J.A. 210; it concluded Rosemond was *not* the shooter, cf. J.A. 205 (government attorney concedes, "I still don't think we know what * * * the basis for the[] verdict was").

There is no serious question that the evidence amply supported the conclusion that Rosemond did not intentionally facilitate or encourage use of a firearm. It is undisputed that Rosemond had just met Perez and Joseph, see J.A. 100, 118; there is no

evidence of a prior relationship that would lead Rosemond to believe either would be armed for the sale of a "measly" amount of poor-quality marijuana, J.A. 207, 93. Indeed, Perez, who arranged the drug transaction and knew Joseph far better than Rosemond did, testified that she was unaware there was a gun present and was "very much in shock" when one was used, J.A. 111, 113, indicating no gun was discussed or displayed beforehand; Gonzales likewise saw nothing to make him aware of any gun, J.A. 96. The evidence suggested the front-seat passenger was quite passive throughout the transaction; both buyers testified that the front-seat passenger "did not turn around and he did not say a word to either of" them. J.A. 87, 92. Perez told police that, after the use of the firearm was complete and the shooter was trying to hide the firearm, "either Justus [Rosemond] or Ronald Joseph[] said, [']I don't want to touch the gun,[']" J.A. 111, 134—compelling evidence of an intent *not* to "facilitate" or "encourage" use of the weapon. Although Perez told police that Rosemond, the stranger who had since returned to Texas, and not her boyfriend's nephew, had both hidden the pistol and later removed it from her car, she recanted at trial, saying she "d[id]n't remember saying that" and "d[id]n't know" whether Rosemond had handled the gun. J.A. 112-113, 115.[13]

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[13] The government contends that Rosemond somehow "facilitated" use of the firearm by "pursu[ing] Gonzales in the vehicle" after the shooting was completed. Br. in Opp. 15; *id.* at 10 n.2. Even if that conduct could facilitate the already-complete firearm use, the evidence indicates that the front-seat passenger was passive and took no steps to "pursue" Gonzales

There is therefore no serious question that "the record contains evidence that could rationally lead to a * * * finding" that Rosemond did not intentionally facilitate or encourage use of the firearm, *Neder*, 527 U.S. at 19. The jury convicted Rosemond of aiding and abetting solely because the district court required only a negligible showing—participation in the drug offense together with knowledge a confederate had a gun, even if Rosemond only learned of the gun's use at the moment "when shots [we]re fired." J.A. 158; U.S. C.A. Br. 12 ("there was sufficient evidence of this knowledge" that "[Rosemond's] cohort used a firearm in the underlying crime" based on testimony that when "Rosemond was in the immediate vicinity, one of Rosemond's cohorts fired several gunshots"). That standard required so little that the government's closing argument did not identify a *single act* of Rosemond's that facilitated or encouraged the firearm's use—other than *listening*. The district judge's comment that this was a "great issue for

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and Painter. The sole disinterested eyewitnesses indicated that the front-seat passenger never exited (and thus did not reenter) the car. J.A. 39-40, 41-42, 48, and the fact that Perez immediately "took off at a high rate of speed" after the shooting, J.A. 42, 49, suggests Rosemond had no opportunity to step out of the car and end his involvement with Perez and Joseph, if he even would have dared to try after Joseph fired his pistol. Perez testified to no actions by petitioner to suggest he was participating in any pursuit, and recalled nothing he said to suggest participation, J.A. 110; indeed, Perez testified that "*I* was trying to catch up to the other guys that took the stuff," J.A. 109 (emphasis added).

appeal" (J.A. 140) certainly suggests he believed it had the potential to affect the verdict.

In its brief in opposition, the government for the first time argued that the error here was harmless, contending that because the jury convicted Rosemond under Counts 3 and 4 of possessing the shell casings found at the scene, and the jury was not explicitly instructed on aiding and abetting liability for those counts, the jury *necessarily* concluded that Rosemond possessed the firearm that had held them. Br. in Opp. 14. But in granting review notwithstanding that argument, this Court "necessarily considered and rejected that contention" as a basis to avoid deciding the question presented. *United States* v. *Williams*, 504 U.S. 36, 40 (1992). This Court's "normal practice where the court below has not yet passed on [harmlessness]" is to leave it "to the Court of Appeals * * * to consider [the argument] in the first instance." *Neder*, 527 U.S. at 25. But in any event, the argument is meritless; the far likelier conclusion is that the legally flawed "aiding and abetting" instruction permitted Rosemond to be convicted of "possessing" ammunition inside a confederate's firearm.

The district court instructed the jury that possession of a firearm is an element of a Section 924(c) violation, and that the "possession involved carrying, using, brandishing or discharging the firearm." J.A. 191-192. The court also explicitly instructed the jury that "[a]iding and abetting is simply another way of committing the offense[]," J.A. 195, making clear that those who aided and abetted a Section 924(c) were liable for "possession." It

reinforced that conclusion by emphasizing that "[p]ossession may be sole or joint," "actual [or] constructive," and that the term applied to any exercise of "authority, dominion, or control over" the firearm. J.A. 200; see also J.A. 187 (stating that "a person need not have actual physical custody of an object in order to be in legal possession of it"); J.A. 198. After the judge explicitly instructed the jury that it should "find that [Rosemond] 'used' the firearm" (J.A. 203) if it believed he "aided and abetted" the offense, J.A. 211, it is unsurprising that the jury concluded that in "us[ing]" the firearm, he "possessed" the ammunition inside the weapon—a conclusion contemplated by the instructions, which explicitly permitted possession "jointly with another," J.A. 193, specifically the person who actually brandished and discharged the firearm.

In short, this court can have no "confidence" that the error "did not contribute to the verdict obtained." *Neder*, 527 U.S. at 16, 17. Justus Rosemond's Section 924(c) conviction must be reversed.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant may be convicted of aiding and abetting the use or carriage of a firearm during and in relation to a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. 924(c) and 2, if the defendant actively participated in a crime of violence or drug-trafficking crime and knew that an accomplice used or carried a firearm in the commission of that offense.

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In the Supreme Court of the United States

No. 12-895

JUSTUS C. ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 16, 2013. The petition was filed on that date, and was granted on May 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, at 1a-14a.

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). Pet. App. 28a-30a; J.A. 11-13. He was sentenced to concurrent sentences of 48 months of imprisonment on Counts 1, 3, and 4, and a consecutive sentence of 120 months of imprisonment on Count 2, to be followed by five years of supervised release. Pet. App. 15a, 18a. The court of appeals affirmed. *Id.* at 1a-11a.

1. On August 26, 2007, Vashti Perez brokered a deal for the sale of one pound of marijuana to Ricardo Gonzales and Coby Painter, which was to take place in a park in Tooele, Utah. Pet. App. 2a. She told Gonzales and Painter that the marijuana belonged to two men looking to dispose of it before returning home to Texas. See J.A. 79-80.

That evening, Perez drove to the park in a blue Mazda Protegé to conduct the transaction. J.A. 102. With her in the car were two men. *Ibid.* The first was petitioner, a Texan visiting town with his brother, a friend of Perez's boyfriend. J.A. 100, 118-120. The second was Ronald Joseph, the nephew of Perez's boyfriend. J.A. 115, 118. At least one man sat in the

backseat, but witnesses later had different recollections about which man sat where.

Gonzales and Painter arrived at the park around 9:00 p.m. J.A. 80. While Painter waited outside, Gonzales entered Perez's car through a backdoor. J.A. 91-92. A man sitting in the backseat of the vehicle then allowed Gonzales to examine the marijuana. J.A. 122. Instead of paying for it, however, Gonzales punched that man in the face and fled with the marijuana. Pet. App. 2a; J.A. 95, 122. As Gonzales and Painter ran away, one of the two male occupants of the car fired several shots from a 9-millimeter semiautomatic handgun. Pet. App. 2a; J.A. 124. Because the deal had occurred near a residential community, multiple witnesses heard the shots, and one bullet landed on the sidewalk adjacent to a senior citizen's home. See J.A. 30-31, 39-40, 166; 12/13/2010 Trial Tr. 78-79, 86-87 (testimony of David Hammond).

Petitioner, Joseph, and Perez then set out after Gonzales in the car. J.A. 109, 125. They were stopped by a state trooper a short time later, however, after a police dispatcher announced that shots had been fired in the park and that a blue vehicle carrying three passengers had driven away from the scene of the shooting. Pet. App. 2a-3a; J.A. 44, 56-57. As the trooper walked up to Perez's stopped car, petitioner, who was sitting in the front passenger seat, was recorded by the trooper's video camera turning around and making movements. J.A. 58. After obtaining Perez's consent, a second trooper searched the car but did not find a firearm. Pet. App. 3a; J.A. 57, 62-63. The troopers therefore did not make an arrest at that time.

In the weeks immediately after the shooting, the police conducted a further investigation. They discovered seven 9-millimeter shell casings in the park near the scene of the shooting. J.A. 45-47. Officers interviewed Perez, who identified petitioner as the shooter and explained that he had concealed the gun in the car during the traffic stop and retrieved it later. J.A. 105-108, 111-114. The police also ultimately learned that petitioner was a convicted felon and an alien in the country illegally. See J.A. 199.

2. a. Petitioner was indicted in the United States District Court for the District of Utah on one count of possessing marijuana with intent to distribute it and aiding and abetting that offense, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm during and in relation to a drug-trafficking crime and aiding and abetting that offense, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). J.A. 11-13. He pleaded not guilty, and the case proceeded to a jury trial.

The government argued that petitioner had been the man sitting in the backseat of Perez's car, and that, after Gonzales absconded with his marijuana, petitioner had discharged the semiautomatic handgun. At trial, Perez and Joseph both testified that the marijuana had belonged to petitioner and that he was the man Gonzales had punched. J.A. 99-100, 104-105, 117, 122. Joseph testified that petitioner had fired the shots at Gonzales. Pet. App. 3a; J.A. 123-124. Perez,

who had signed a declaration immediately after the incident stating that petitioner "did the shooting," testified that she did not directly "see [petitioner] fire the gun but in my mind that's what I thought happened," likely because the drugs belonged to him. J.A. 105-108. Both said that everyone had exited the vehicle when the firing started and then had reentered the vehicle to pursue Gonzales, with petitioner at that point sitting in the front seat. J.A. 109, 124. Painter testified that a man most closely matching petitioner's description ("bald and wearing glasses") had been the person Gonzales punched. J.A. 61, 83. Gonzales, however, testified that the man matching Joseph's appearance ("in an Indianapolis Colts jersey") had been the person in the backseat, J.A. 92-95, while Joseph said that he thought that both he and petitioner had been sitting in the backseat, J.A. 122.

Joseph also testified that the state trooper had not found the firearm during the search of the vehicle because petitioner had concealed it under the backseat. J.A. 128. Perez claimed not to remember petitioner's concealment of the firearm and subsequent retrieval of it. J.A. 111-112. Consistent with the video recording, which was introduced into evidence, the trooper who had stopped Perez's car testified that, at the time of the stop, petitioner was the only occupant who was "moving around a lot inside the vehicle." J.A. 57-59, 68-69.

b. Count 2 charged petitioner with violating 18 U.S.C. 924(c). The "use or carry" prong of that provision subjects to a mandatory-minimum sentence of five years "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm," with seven- and

ten-year minimums, respectively, if a firearm is brandished or discharged. 18 U.S.C. 924(c)(1)(A). That sentence must run consecutively to any sentence imposed for the crime of violence or drug-trafficking crime. 18 U.S.C. 924(c)(1)(D)(ii). In this case, the underlying drug-trafficking crime was the charge of possession of marijuana with intent to distribute it set forth in Count 1.

Consistent with the indictment, the government sought aiding-and-abetting instructions for Counts 1 and 2. The district court accordingly instructed the jury that "you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense." J.A. 195. "In order to aid or abet another to commit a crime," the court continued, "it is necessary that the defendant willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly seeks by some act to help make the crime succeed." J.A. 196 (paraphrasing *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)). Petitioner did not object to that instruction.

Petitioner and the government, however, proposed different jury instructions with respect to how that general standard applies to a Section 924(c) offense. Petitioner requested a two-pronged instruction stating that "[t]he defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant intentionally took some

action to facilitate or encourage the use of the firearm." J.A. 14-15. The government proposed an instruction that was materially identical on the first prong, but that for the second prong stated that "the defendant knowingly and actively participated in the drug trafficking crime." J.A. 16. Although petitioner acknowledged that the government's instruction was consistent with circuit precedent, he objected to it on the ground that the relevant Tenth Circuit decisions each involved crimes of violence, not drug-trafficking crimes. J.A. 138-140.

The district court called petitioner's proffered distinction a "great issue for appeal" but ultimately rejected it. J.A. 140. The court accordingly instructed the jury that to find petitioner guilty of aiding and abetting the Section 924(c) offense, it "must find that: (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." J.A. 195-196.

The government did not seek an aiding-and-abetting instruction on the two ammunition-possession counts (Counts 3 and 4). See J.A. 194-195. The court therefore told the jury that to convict petitioner on those counts, it was required to find that petitioner "knowingly possessed the ammunition." J.A. 198, 199.

c. In its summation, the government argued that "the evidence establishes beyond a reasonable doubt that it was [petitioner] who fired at least seven rounds from a 9 millimeter semi-automatic handgun" in order to protect the marijuana that petitioner "had brought to the park to sell." Pet. App. 32a; J.A. 141-142. The government also advanced the "alternative legal theo-

ry" that the jury could convict petitioner for aiding and abetting the Section 924(c) offense. J.A. 157-158. Under that theory, the government explained, if one of petitioner's accomplices had "fired the gun, [petitioner is] still guilty of the crime * * * based on the evidence before you." *Ibid.* Petitioner "certainly knew and actively participated" in the drug-trafficking crime, the government argued, and "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158. With respect to the ammunition-possession counts, the government argued that because the evidence established that petitioner had possessed the firearm, "he had to have also possessed the cartridge cases that were inside the 9 millimeter [gun]." J.A. 159.

Defense counsel suggested to the jury that Joseph, Gonzales, or Painter could have been the shooter and that the marijuana might have belonged to Perez and Joseph. J.A. 163, 171, 173. He made no argument that petitioner could have possessed the ammunition without possessing the gun.

d. During deliberations, the jury sent a note to the trial judge asking whether "aiding and abetting appl[ied] to Question Three" on the verdict form. J.A. 210 (capitalization altered). Question 3 asked the jury to determine, if it found petitioner guilty on Count 2, whether petitioner had "used," "carried," "brandished," or "discharged" a firearm. J.A. 203. The court instructed the jury to answer Question 3 if the jury found petitioner guilty of Count 2 under any theory. J.A. 211.

The jury found petitioner guilty on all four counts and checked all four options in Question 3. J.A. 202-

204. The verdict form did not require the jury to indicate whether it found petitioner guilty on the first two counts because he committed the offense or because he aided and abetted another's commission of it. Pet. App. 28a-30a. The district court sentenced petitioner to concurrent terms of 48 months of imprisonment on Counts 1, 3, and 4 and a consecutive 120-month sentence on Count 2, to be followed by five years of supervised release. See J.A. 207-208.

3. On appeal, petitioner argued that the district court's instruction on aiding and abetting a Section 924(c) offense was erroneous insofar as it stated that the government was required to prove that "the defendant knowingly and actively participated in the drug trafficking crime." Pet. C.A. Br. 18-19. He argued, consistent with his objection at trial, that the government was required to prove that he "intentionally [took] some action to facilitate or encourage the use of a firearm." *Ibid.*

The court of appeals rejected that argument and affirmed petitioner's conviction. Pet App. 5a-10a. The court held that, whether the underlying crime is a crime of violence or a drug-trafficking crime, a person is guilty as an aider and abettor when he "(1) kn[e]w a cohort used a firearm in an underlying crime of violence, and (2) knowingly and actively participated in that underlying crime." *Id.* at 7a-8a (citation omitted).

SUMMARY OF ARGUMENT

I. The district court correctly instructed the jury on aiding and abetting a Section 924(c) violation.

A. The parties agree that "aiding and abetting liability requires a finding that the defendant (1) *affirmatively acted* to facilitate or encourage commission of the offense he is accused of aiding and abetting; and

that he (2) *intended* to facilitate or encourage the commission of that offense." Pet. Br. 13 (emphases added). Petitioner contends that to aid and abet a violation of Section 924(c), an individual must "intentionally facilitate or encourage the use of a firearm." Pet. i. That issue focuses on the affirmative-act requirement of aiding and abetting: must the defendant take action directed specifically at facilitating the firearm's use or carriage? In accordance with a long and unbroken understanding of the law of aiding and abetting, a defendant need not assist in every aspect of the criminal venture or directly aid the principal's completion of every element of the offense, so long as the defendant facilitated *some* aspect of the crime and intended that the charged criminal venture succeed. Under that test, petitioner's claim fails.

1. Since long before Congress codified the doctrine of accomplice liability in Section 2(a), it has been understood that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States* v. *Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987). As the very sources petitioner cites explain, "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted * * * is enough to make a man an [accomplice] as to any crime committed in execution of the plan." 1 Francis Wharton, *A Treatise on Criminal Law* § 213, at 231 (10th ed., Phil., Kay & Brother 1896) (Wharton) (emphasis added). Applying that blackletter principle, this Court has concluded that the fact that an accomplice does not participate in every element of an offense is no barrier to conviction. See *Pereira* v. *United States*, 347 U.S. 1, 8-10 (1954).

2. That rule defeats petitioner's claim. To secure a conviction of a person for violating Section 924(c), the government must prove "[i] that [the defendant] used [or carried] a firearm, [ii] that he committed all the acts necessary to be subject to punishment for * * * a crime of violence[] [or drug-trafficking crime] in a court of the United States, and [iii] that he used [or carried] the gun 'during and in relation to'" that crime. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). This Court has made clear that Section 924(c) "proscribe[s] both the use of the firearm *and* the commission of acts that constitute a violent crime" or drug-trafficking crime. *Id.* at 281. When a defendant furnishes aid or encouragement with respect to either of those "essential conduct elements," *id.* at 280, he satisfies the affirmative-act requirement. And when he does so with the intent to help a person complete the Section 924(c) offense, he is guilty as an accomplice.

Petitioner argues that the government's position "conflates two distinct offenses" by making the requirements for aiding and abetting the crime of violence or drug-trafficking crime coextensive with the requirement of aiding and abetting the Section 924(c) violation. Pet. Br. 38 (capitalization altered). But all agree that it is not enough for conviction that a person intentionally aid the commission of a crime of violence or drug-trafficking crime. Rather, to aid and abet a Section 924(c) violation, the person must intend that his assistance will help another person commit the crime of violence or drug-trafficking crime with a firearm. That *intent* can exist (and be proved) even if the manner in which the defendant facilitates the Section 924(c) offense is to aid in the predicate crime.

3. No sound reason exists to depart from the settled understanding of accomplice liability in the Section 924(c) context. The basic legislative objective of Section 924(c)—to prevent the dangerous combination of guns with violence or drugs—would be ill-served by petitioner's narrow view of accomplice liability. That view would also produce substantial disparities in sentences imposed on different offenders without any defensible justification. Petitioner's approach would further generate a host of imponderable questions for juries and courts based on the need to draw fine lines over what conduct directly facilitates firearm use. And although petitioner observes that eight of the eleven circuits to consider the issue have technically adopted his position, the majority of those circuits have held that a defendant can be liable as an accomplice if he merely "benefits" from his confederate's use or carriage of the firearm—a rule indistinguishable in practical application from the government's approach.

B. 1. Throughout his brief petitioner also appears to challenge whether the instructions below adequately described the intent requirement for accomplice liability. But that is not the question on which this Court granted certiorari, and petitioner did not object to the intent instructions below. The Tenth Circuit has long held that the defendant must have "acted with the intention of causing the [Section 924(c) offense] to be committed" by the principal, *United States* v. *Bindley*, 157 F.3d 1235, 1238 (1998), cert. denied, 525 U.S. 1167 (1999), and petitioner's case-specific, untimely claim of instructional error does not warrant this Court's review. At minimum, the claim should be reviewed for plain error.

2. The district court's intent instructions were correct in any event. The court instructed the jury that it had to find that petitioner "willfully and knowingly" sought "to help make the crime succeed" by intentionally participating in the drug-trafficking offense knowing that his confederate would commit it with a firearm. J.A. 196. That instruction was correct because "it has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would * * * make the principal's success more likely." *United States* v. *Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (Posner, J.).

II. If this Court finds instructional error, it should either hold that the error was harmless or remand to the court of appeals for a harmless-error analysis. The jury convicted petitioner of two counts of possessing ammunition without receiving an aiding-and-abetting instruction on those counts. The government's only theory on those counts was that petitioner had fired the gun. At minimum, petitioner's possession of the very ammunition that a confederate used in discharging a firearm would satisfy the requirements for accomplice liability under any conceivable standard.

ARGUMENT

I. THE DISTRICT COURT'S AIDING-AND-ABETTING INSTRUCTIONS WERE CORRECT

A. Active Participation In A Crime Of Violence Or Drug-Trafficking Crime Satisfies The Affirmative-Act Requirement For Accomplice Liability

Under Section 2(a) of Title 18, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." 18 U.S.C. 2(a). The parties agree that accomplice liability under Section 2(a) has two requirements: "that the defendant (1) *affirmatively acted* to facilitate or encourage commission of the offense he is accused of aiding and abetting; and that he (2) *intended* to facilitate or encourage the commission of that offense." Pet. Br. 13 (emphases added). Those two requirements—an affirmative act of assistance or encouragement and the intent to help the principal commit the offense—follow from this Court's teaching that "it is necessary that a defendant 'in some sort associate himself with the [criminal] venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)); see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) ("[Section 2(a)] decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.").

The question on which this Court granted certiorari concerns the first, affirmative-act requirement:

"[w]hether the offense of aiding and abetting the [Section 924(c) offense] requires proof of * * * intentional facilitation or encouragement of the use of the firearm." Pet. i. The answer to that question is no. This Court has held that the "use or carry" prong of Section 924(c) has two "essential conduct elements": the carriage or use of a gun *and* the commission of a crime of violence or drug-trafficking crime. See *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). It has long been settled that any aid or encouragement relating to the criminal venture satisfies the affirmative-act requirement for aiding and abetting; the defendant need not participate in *every* aspect of the venture. Accordingly, proof that a defendant assisted or encouraged either conduct element of the Section 924(c) offense, with the intent to help the principal complete the offense, establishes accomplice liability. Petitioner has identified no compelling reason in history or practical policy to depart from the principle that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States* v. *Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987).

1. An accomplice need not directly facilitate or encourage each element of the offense

The federal aiding-and-abetting statute was enacted in 1909 against a well-settled common-law backdrop of accomplice liability. See *Standefer* v. *United States*, 447 U.S. 10, 18-19 (1980); Act of Mar. 4, 1909, ch. 321, § 332, Pub. L. No. 60-350, 35 Stat. 1088, 1152. Although the enactment abolished certain procedural distinctions between different classes of accessories, it did not modify the longstanding principle that "the government need not prove assistance related to eve-

ry element of the underlying offense." *United States* v. *Woods*, 148 F.3d 843, 850 (7th Cir. 1998).

a. Section 2(a) subjects to punishment as a principal two categories of common-law accomplices: second-degree principals and accessories before the fact. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *Hammer* v. *United States*, 271 U.S. 620, 628 (1926); S. Rep. No. 10, 60th Cong., 1st Sess. Pt. 1, at 13-14 (1908). A second-degree principal was "one who shares the guilty purpose and, while not taking part in the actual commission of the crime, is present, encouraging, assisting, or abetting its commission, or is so near, as to be of material service to the criminal at the very time of the commission, and is there for that purpose." John G. Hawley & Malcolm McGregor, *The Criminal Law* 81 (5th ed., Detroit, Sprague Publishing Co. 1908) (Hawley & McGregor). An accessory before the fact was even further removed from the ultimate criminal acts: "one who procures, advises, commands, or solicits a crime to be committed by a guilty agent, or, furnishes aid in advance towards its commission, but is not present when the crime is committed, and does not, at that time, aid or abet its commission." *Id.* at 82; see also William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 176, at 245 (2d ed., St. Paul, Keefe-Davidson Co. 1905) (Clark & Marshall). The verbs that Congress employed in Section 2(a)—"aids, abets, counsels, commands, induces, or procures"—capture those two types of accomplices. See Wayne R. LaFave, *Criminal Law* 666 (4th ed. 2003) (LaFave).

At common law, conviction as a second-degree principal or an accessory before the fact required only minimal participation in the offense—as the very

sources petitioner cites make clear. As explained by the 1896 edition of the Wharton treatise (then, as now, a "leading treatise," Pet. Br. 18-19), "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted, and there be constructive presence, [was] enough to make a man principal in the second degree." 1 Wharton § 213, at 231. If a defendant was "present abetting while *any act* necessary to constitute the offence [was] being performed through another, though *not the whole thing necessary* * * * he [was] a principal." 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 649, at 360 (6th ed. rev. 1877) (emphases added) (footnote omitted). And "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual in the absence of all the rest, all [were] principals as to the whole." *Id.* § 650, at 360. "Thus," Wharton explained by way of example, "if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away so that he who has the goods may carry them off, all are guilty as principals." Wharton, § 213, at 231; see, *e.g.*, *Mitchell* v. *Commonwealth*, 74 Va. (33 Gratt.) 845, 868-869 (1880).

Courts did not require that a defendant perform any particular act to be liable as an accomplice. Indeed, it was "enough to make one a principal in the second degree if he [was] present in concert with the actual perpetrator of the offense, for the purpose of assisting if necessary, or of watching and preventing interference or detection, or for the purpose of encouragement." Clark & Marshall § 174, at 244; see,

e.g., *Hicks* v. *United States*, 150 U.S. 442, 450 (1893) (explaining that presence of accomplice is sufficient for liability so long as parties had previously agreed that he would be present for the purpose of assistance). For example, defendants who did not themselves directly assist in breaking into a building during a burglary, but who were "ready and near enough to render * * * assistance" with knowledge of the first-degree principals' actions, were considered second-degree principals. *Doan* v. *State*, 26 Ind. 495, 495 (1866). Matthew Hale similarly explained in the context of murder that "[i]f many be present, and only one gives the stroke, whereof the party dies, they are all principal, if they came for that purpose." 1 Matthew Hale, *The History of the Pleas of the Crown* 440 (1736).

What was vital was not assistance or encouragement in every aspect of the criminal enterprise, but assistance or encouragement with the intent to help or encourage the principal to commit the offense. It was sufficient for liability that the defendant "do or say something showing consent to the felonious purpose, and * * * contribute something to its execution," but "[t]he quantity [was] immaterial." Robert Desty, *A Compendium of American Criminal Law* § 37a, at 106 (S.F., Sumner Whitney & Co. 1882).

b. Section 2(a) incorporates that established principle. As petitioner explains, "Congress gave no indication, when it enacted the predecessor of Section 2, that it did not intend to incorporate the well-settled meaning of 'aiding and abetting.'" Pet. Br. 24 (internal quotation marks and citation omitted). That term of art "comprehends *all* assistance rendered by words, acts, encouragement, support, or presence." *Reves* v.

Ernst & Young, 507 U.S. 170, 178 (1993) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)) (emphasis added). Congress employed "a term of breadth," *ibid.*, that includes any acts providing support for the crime, even if the acts do not facilitate the principal's completion of every element of the offense. And when Congress amended the statute in 1951 to provide that an accomplice "is punishable as a principal" (rather than "is a principal"), it did so to dispel any doubt that a person could be liable even if she could not satisfy a personal-status element of a particular offense (*e.g.*, solicitation of a bribe by a public official, 18 U.S.C. 201(a)(2)). See S. Rep. No. 1020, 82d Cong., 1st Sess. 7-8 (1951). Congress thus understood that accomplice liability does not require the defendant to take part in a direct way in every element of the offense.

This Court has applied this basic tenet of accomplice liability. In *Pereira* v. *United States*, 347 U.S. 1 (1954), the defendant was charged with aiding and abetting mail fraud, 18 U.S.C. 1341, the elements of which comprise a scheme to defraud and the use of the mail for the purpose of executing the scheme. See 347 U.S. at 8-9. The accomplice had knowingly participated in the fraudulent scheme—a "confidence game" in which the principal married a woman on false pretences to induce her to lend money to him—"from beginning to end," thus facilitating the first element of mail fraud. *Id.* at 6, 10. But the evidence showed that it was the principal actor who alone had "caused" the charged mailing. See *id.* at 8, 9; see also *id.* at 15 (Minton, J., concurring in part and dissenting in part) ("Concededly, [the accomplice] did not participate directly in the use of the mails.").

Notwithstanding the defendant's nonparticipation in that element of the offense, the Court held that the "jury could conclude that [he] aided, abetted, or counseled [the principal] in the commission of the specific acts charged," 347 U.S. at 10-11, on the theory that he "shared [the principal's] knowledge" that the mails would be used for "the realization of their common goal," *id.* at 12-13 (affirming conspiracy count based on "what we have said with regard to the substantive offenses"). On that point, the three dissenting Justices agreed with the majority that the accomplice could be convicted even though he played no role in causing the mailing, so long as he "could reasonably have expected" the mail to be used by the principal. See *id.* at 14 (Minton, J., concurring in part and dissenting in part); see also *United States* v. *Johnson*, 319 U.S. 503, 515, 518 (1943) (explaining with respect to defendants convicted of aiding and abetting tax-evasion scheme that "all who shared in [the scheme's] execution have equal responsibility before the law, whatever may have been the different roles of leadership and subordination among themselves"). And this rule parallels the same principle in conspiracy law. As this Court has explained, a defendant can be liable for RICO conspiracy even if he "does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense"; he is liable under traditional principles "by agreeing to facilitate only some of the acts leading to the substantive offense," so long as he "adopt[s] the goal of furthering or facilitating the criminal endeavor." *Salinas* v. *United States*, 522 U.S. 52, 61-66 (1997).

In harmony with this Court's analysis in *Pereira*, courts of appeals applying Section 2(a) have regularly

held that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Sigalow*, 812 F.2d at 785; see, *e.g.*, *Woods*, 148 F.3d at 850 ("[T]he government need not prove assistance related to every element of the underlying offense."); *United States* v. *Arias-Izquierdo*, 449 F.3d 1168, 1176 (11th Cir. 2006) ("The government was not required to prove that [the defendant] participated in each element of the substantive offense in order to hold him liable as an aider and abettor."), cert. denied, 547 U.S. 1006 (2006), and 549 U.S. 1140 (2007).[1] As the D.C. Circuit has ex-

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[1] See also, *e.g.*, *United States* v. *Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) ("[P]roving a defendant guilty of aiding and abetting does not ordinarily require the government to establish participation in each substantive and jurisdictional element of the underlying offense.") (internal quotation marks and citation omitted); *United States* v. *Hathaway*, 534 F.2d 386, 399 (1st Cir.) ("Participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result."), cert. denied, 429 U.S. 819 (1976); *United States* v. *Arrington*, 719 F.2d 701, 705 (4th Cir. 1983) (same), cert. denied, 465 U.S. 1028 (1984); *United States* v. *Milby*, 400 F.2d 702, 706 (6th Cir. 1968) ("We think it unnecessary that each defendant be shown either to have committed the offenses charged in the indictment or to have physically assisted in every detail of their perpetration."). Only the Ninth Circuit has expressly held otherwise. See *United States* v. *Dinkane*, 17 F.3d 1192, 1196-1198 (1994). The Fifth Circuit's standard, which requires a defendant to "aid and abet, rather than commit, each element of the crime," *United States* v. *Cauble*, 706 F.2d 1322, 1339 (1983), cert. denied, 465 U.S. 1005 (1984), begs the question of what it means to "aid and abet." So does a sentence from the United States' *Criminal Resource Manual* cited by petitioner at the certiorari stage (Cert. Reply Br. 6-7). See U.S. Dep't of Justice, *Criminal Resource Manual* § 2474 (1998). That discussion, moreover, goes on to explain that a defendant's "level of participa-

plained, the notion that "participation in each element of the substantive offense" is required for accomplice liability "ignores the breadth of the aiding and abetting statute." *United States* v. *Garrett*, 720 F.2d 705, 713 n.4 (1983), cert. denied, 465 U.S. 1037 (1984). Rather, participation of even "relatively slight moment" is sufficient. *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962) (Friendly, J.). State courts interpreting their own accomplice-liability provisions, which grew out of the same common-law tradition, have likewise concluded that "it is not necessary that the evidence show the accomplice personally participated in the commission of each element of the offense." *Fox* v. *State*, 497 N.E.2d 221, 227 (Ind. 1986).[2]

Accordingly, the affirmative-act requirement for accomplice liability can be met by a wide variety of conduct only tangentially related to any particular element of the offense, such as "act[ing] as a lookout," "man[ning] the getaway car," "signal[ing] the approach of the victim," and even "standing by at the scene of the crime ready to give some aid if needed." LaFave 672-673. The "assistance given," furthermore, "need not contribute to the criminal result in the sense that but for it the result would not have ensued." *Id.* at 674 (quoting *State* v. *Tally*, 15 So. 722, 738 (Ala. 1894)). And "[t]he *quantity* of aid rendered

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tion may be of relatively slight moment" and that "it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established." *Ibid.*

[2] See *Meadows* v. *State*, 386 S.W.3d 470, 475 (Ark. 2012); *Krueger* v. *State*, 267 N.W.2d 602, 609 (Wis.), cert. denied, 439 U.S. 874 (1978); *People* v. *Hall*, 231 N.E.2d 416, 421 (Ill. 1967); *State* v. *Gatlin*, 241 P.3d 443, 446 (Wash. App. 2010).

is of no consequence." Wharton § 234, at 252. As long as the defendant acts "with the intent to facilitate the crime," *Central Bank of Denver*, 511 U.S. at 181, his assistance or encouragement need not relate to every aspect of the offense.

Any other rule would be untenable. Consider kidnapping. Under one definition, that crime "contains three requirements: (1) knowing removal or confinement, (2) substantial interference with the victim's liberty, and (3) force, threat, or fraud." *United States* v. *Cervantes-Blanco*, 504 F.3d 576, 580 (5th Cir. 2007). Suppose a principal sets out to kidnap someone by fraudulently inducing him to get into a car. One accomplice might make a phone call giving the victim a fraudulent reason to enter the vehicle. *E.g.*, *United States* v. *Jenkins*, No. 12-13-GFVT, 2013 WL 3158210, at *24 (E.D. Ky. June 20, 2013) (accomplice "helped [principal] lure [victim] into a truck"). Another accomplice might drive the car. *E.g.*, *Wallace* v. *Lockhart*, 701 F.2d 719, 728 (8th Cir. 1983) (defendant "was an accomplice to the kidnapping based upon his participation in driving [the victim] to [an] apartment and then later driving [him] to the river"), cert. denied, 464 U.S. 934 (1983). A third accomplice might allow the principal to use her house to hold the victim captive. *E.g.*, *State* v. *Corean*, 791 N.W.2d 44, 61-62 (S.D. 2010) (defendant "aided and abetted [principal] by allowing her house to be used as a sanctuary to facilitate the kidnapping"). And a fourth accomplice might merely wait outside the victim's house to assist with force if necessary. See Clark & Marshall § 174, at 244; cf. *Garguilo*, 310 F.2d at 253 (giving as example of aiding and abetting "the attendance of a 250-pound bruiser at a shakedown as a companion to the extor-

tionist"). So long as all four confederates have the intent to help the principal complete the kidnapping, each is subject to accomplice liability, even though none of them participates in every element of the offense.

c. Petitioner spends a great deal of his brief discussing the basic, undisputed requirements for accomplice liability—some affirmative act of assistance or encouragement and the intent to help the principal's offense succeed. Pet. Br. 16-31. But he asserts only summarily the legal proposition that is central to his case: that it is not "enough that the defendant participated in the criminal venture in some general sense." *Id.* at 22. As discussed above, that assertion has no support in the common-law principles that Section 2(a) codified. Indeed, the very sentence that petitioner cites from the Wharton treatise as support for his position explains that "presence alone" is sufficient where the accomplice "knows that his presence will be regarded by the perpetrator as an encouragement and protection." Wharton § 211a, at 229. And two pages later, Wharton makes clear that "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted * * * is enough." *Id.* § 213, at 231 (emphasis added). The only other source that petitioner cites for the point merely quotes verbatim an 18th Century British anti-forgery statute. See Pet. Br. 22 (citing 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* § 17, at 889 (Phil., P. Bryne 1806)). It is unclear what relevance petitioner ascribes to that law.

2. Because commission of a crime of violence or drug-trafficking crime is an essential conduct element of Section 924(c), active participation in such a crime satisfies the affirmative-act requirement

a. Under the foregoing principles of accomplice liability, active participation in a crime of violence or drug-trafficking crime satisfies the affirmative-act requirement for aiding and abetting a Section 924(c) violation. The "use or carry" prong of Section 924(c) subjects to criminal punishment "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm." 18 U.S.C. 924(c)(1)(A). To prove that a defendant committed that violation, the government must establish three elements: "[i] that [the defendant] used [or carried] a firearm, [ii] that he committed all the acts necessary to be subject to punishment for * * * a crime of violence[] [or drug-trafficking crime] in a court of the United States, and [iii] that he used [or carried] the gun 'during and in relation to'" that crime. *Rodriguez-Moreno*, 526 U.S. at 280; see also *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (grouping requirements into two elements).

In light of the longstanding principles set forth above, a defendant's aid or encouragement with respect to either active element of the crime satisfies the affirmative-act requirement for accomplice liability. A defendant who participates in a crime of violence or drug-trafficking crime with his armed confederate therefore meets the affirmative-act requirement. (He also must meet the separate intent requirement, discussed below.) While such participation does not necessarily facilitate or encourage the use of the firearm in a specific way, it facilitates the gun's use *dur-*

ing and in relation to a crime of violence or drug-trafficking crime. The primary offender, despite his use or carriage of the firearm, could not commit the Section 924(c) offense without the commission of a crime of violence or drug-trafficking crime. Here, for example, had petitioner "not been dealing drugs," the shooter (assuming it was someone else) may not "have [had] use for his gun." *United States* v. *Rattigan*, 151 F.3d 551, 558 (6th Cir.), cert. denied, 525 U.S. 1031 (1998).

Petitioner's contrary view appears to rest on the assumption that the only significant element in a Section 924(c) offense is the use or carriage of the firearm, not the commission of the crime of violence or drug-trafficking crime. See Br. 33-34. Borrowing the Ninth Circuit's reasoning, petitioner argues that "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the [drug trafficking] crime." *Id.* at 33 (quoting *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997)) (brackets in original). Therefore, the argument goes, "the intentional act of facilitation or encouragement required by Section 2 must be directed at the use of the firearm." *Ibid.*

Petitioner's premise is mistaken. This Court has unanimously rejected the view that the use or carriage of a firearm is the only significant element of a Section 924(c) offense. In *Rodriguez-Moreno*, a multi-state drug transaction had culminated with the defendant pointing a gun at a victim at a location in Maryland. See 526 U.S. at 276-277. The Third Circuit held that the defendant's trial in New Jersey federal court violated Article III of the Constitution and the Sixth Amendment because the Section 924(c) offense had

occurred in Maryland, the only State where the defendant was alleged to have used a firearm. See *United States* v. *Palma-Ruedas*, 121 F.3d 841, 847-851 (1997), cert. denied, 522 U.S. 1062, 522 U.S. 1096, 522 U.S. 1142, 523 U.S. 1033, and 524 U.S. 915 (1998); U.S. Const. Art. III, § 2, Cl. 3; Amend. VI.

This Court concluded that the Third Circuit had "overlooked an essential conduct element of the Section 924(c)(1) offense": that the defendant committed a crime of violence. 526 U.S. at 280. By "criminaliz[ing] a defendant's use of a firearm 'during and in relation to' a crime of violence," the Court explained, "Congress proscribed *both* the use of the firearm *and* the commission of acts that constitute a violent crime." *Id.* at 281 (first emphasis added). Accordingly, a prosecution for a Section 924(c) offense "is proper in any district where the crime of violence [or drug-trafficking crime] was committed, even if the firearm was used or carried only in a single district." *Id.* at 276. The two dissenting Justices in *Rodriguez-Moreno* likewise rejected the view "that using the firearm is 'the entire essence of the offense,'" finding, like the majority, that "[t]he predicate offense is assuredly an element of the crime." *Id.* at 285 (Scalia, J., dissenting) (quoting U.S. Reply Br., at 9 (No. 97-1139)).[3]

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[3] The dissent believed that due to the "during and in relation to" element of the Section 924(c) offense, its commission can occur only in a district in which both of the active elements occurred. See 526 U.S. at 283. That view would not support petitioner's approach, because, as explained above, accomplice liability has never required an accomplice to assist in every element of an offense.

As the Court explained in *Rodriguez-Moreno*, the view that only the firearm element is important in defining the Section 924(c) offense erroneously attaches significance to the fact that "the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs." 526 U.S. at 280. Congress could have, without altering the substance of the offense at all, written the statute to read: "Whoever ~~during and in relation to~~ **commits** any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States **and during and in relation to that crime** uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years." *Palma-Ruedas*, 121 F.3d at 860 (Alito, J., concurring in part and dissenting in part) (alterations in original). In that case, a person who actively participates in the crime of violence or drug-trafficking crime would unquestionably satisfy the affirmative-act requirement for aiding and abetting. The same is true for the statute as written: The commission of the underlying crime is an element that is just as significant as the use or carriage of the firearm, and thus facilitating that crime satisfies the affirmative-act requirement.

While it is true that "Section 924(c) establishes a separate, freestanding offense that is 'distinct from the underlying federal felony,'" Pet. Br. 32 (quoting *Simpson* v. *United States*, 435 U.S. 6, 10 (1978)), it is equally true that Section 924(c) establishes an offense that is distinct from any penalty that might be imposed for the use or carriage of a firearm—such as penalties for firing a gun seven times in a public park. Section 924(c) punishes the temporal and relational

conjunction of those two separate acts. No logical reason exists to subject a person to accomplice liability for aiding one of those acts but not for aiding the other. Indeed, active participation in a crime of violence or drug-trafficking crime presents a far more direct instance of accomplice liability than the examples of aiding and abetting that populate criminal-law treatises. At common law, an accomplice could be liable as a second-degree principal merely for being present at the scene of an offense with the understanding that he would offer aid if necessary—*i.e.*, even if he did not directly facilitate *any* element of the offense. See pp. 17-18, *supra*. Given that historical baseline, when a defendant actively and intentionally participates in one element of the offense, he readily meets the affirmative-act requirement.

b. Petitioner does not dispute that the commission of a crime of violence or a drug-trafficking crime is an element of the Section 924(c) offense, and he does not expressly argue that accomplice liability requires an affirmative act related to each element of an offense. But he objects to the application of that principle here on the ground that it assertedly would allow conviction based on nothing more than what is necessary to prove aiding and abetting the underlying crime of violence or drug-trafficking crime and that it therefore "conflates two distinct offenses." Pet. Br. 38 (capitalization altered).

That is incorrect. Aiding and abetting liability requires both an affirmative act of facilitation—which may consist of participating in the underlying crime of violence or drug-trafficking crime or some other conduct—*and* the intent that the act help the principal complete the Section 924(c) offense (as well as the

principal's actual completion of the Section 924(c) offense). A defendant who does not know that his confederate intends to bring along a firearm to a violent crime or drug transaction when he completes his intentional act of facilitation or encouragement is not guilty of aiding and abetting a Section 924(c) offense, though he is guilty of aiding and abetting the underlying crime. See pp. 48-49, *infra*.

Criminal law often punishes criminal conduct more harshly when the offender intends to facilitate a further crime by a confederate, even if the offender's overt actions constitute the commission of a more basic crime.[1] For example, Section 2113(a) of Title 18 generally prohibits bank robbery, and Subsection (d) establishes an aggravated form of that offense, with greater penalties, for armed bank robbery. A person who drives the getaway car for a bank robbery, which is independently unlawful under Subsection (a), is liable for aiding and abetting armed bank robbery under Subsection (d) if he knows that the plan calls for his confederates to use weapons. See *United States* v. *Spinney*, 65 F.3d 231, 236 (1st Cir. 1995) ("A participant in the holdup of a bank will be found to be an aider and abettor of an *armed* robbery only if the

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[1] Indeed, under co-conspirator liability principles, it is not always necessary that the confederate's further crime be intended. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946). An alternative way to convict an accomplice under Section 924(c)(1) is to give the jury a "*Pinkerton*" instruction: *i.e.*, that the accomplice is liable for the Section 924(c)(1) offense because it was a reasonably foreseeable result of a conspiracy to which she was a part. See, *e.g.*, *United States* v. *Casiano*, 113 F.3d 420, 427 (3d Cir. 1996), cert. denied, 522 U.S. 887 (1997). Because no *Pinkerton* instruction was given in this case, that basis for liability is not at issue here. Cf. *Pereira*, 347 U.S. at 10 n.*.

government can provide * * * proof that the accomplice knew a dangerous weapon would be used [in the robbery] or at least . . . was on notice of the likelihood of its use.") (internal quotation marks and citation omitted) (brackets in original); see also, *e.g.*, *United States* v. *Wallace*, 212 F.3d 1000, 1003-1004 (7th Cir. 2000); but see *United States* v. *Dinkane*, 17 F.3d 1192, 1195-1198 (9th Cir. 1994) (suggesting that act of assistance related directly to the gun is required under Section 2113(d)). Likewise, a defendant can be guilty of aiding and abetting a confederate's distribution of illegal drugs, 21 U.S.C. 841(a)(1), if he takes possession of the drugs in order to facilitate the confederate's distribution scheme, even though possession is independently unlawful, 21 U.S.C. 844(a).

Nor is accomplice liability for independently unlawful acts that intentionally facilitate a separate offense inherently unfair. In most cases, an accomplice's affirmative act of assistance or encouragement—driving a vehicle, say, or depositing money in a bank account—would be completely innocuous but for being paired with the knowledge of what the principal plans to do when he arrives at the location or collects the funds. When a legislature penalizes that conduct, it does not punish driving or banking, but rather the role that the conduct played in aiding another's offense. So too here: petitioner's Section 924(c) conviction punishes him not merely for actively participating in a drug deal, but for doing so with the intent to help an accomplice complete that offense with a firearm. That his conduct would have been unlawful even if a firearm was not involved does not confer on him a special immunity from accomplice liability.

Petitioner relatedly suggests (Br. 40) that the government's position would impose accomplice liability for "mere presence" at the scene of the offense. That is also incorrect. The offender must intentionally participate in, facilitate, or encourage the crime of violence or drug-trafficking crime with the knowledge that his confederate will complete that offense with a firearm. Those who, side-by-side with armed confederates, perpetrate bank robberies, *e.g.*, *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996), kidnap people, *e.g.*, *United States* v. *Obregon*, 371 Fed. Appx. 556, 559 (5th Cir. 2010) (unpublished), commit gang rapes, *e.g.*, *United States* v. *Ayala*, 601 F.3d 256, 263 (4th Cir.), cert. denied, 131 S. Ct. 262 (2010), and traffic in illegal drugs, *e.g.*, J.A. 191, 202, are not passive observers. They are active participants.

c. Petitioner invokes (Pet. Br. 49-51) the rule of lenity. But that tie-breaking rule of statutory construction applies only where the Court finds "grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citation omitted). The application of settled principles of accomplice liability does not call for the Court to resolve any textual ambiguity.[5] The canon, moreover, is designed to ensure fair notice to citizens of what the criminal laws require. *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). A person who knowingly assists an armed confederate in robbing a bank, committing a sexual assault, or

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[5] This case does not implicate the view that "the rule of lenity [has] special force in the context of mandatory minimum provisions." *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting), because petitioner's position is that he should not be liable under Section 924(c) at all.

selling drugs should understand that he may be held to account for aiding and abetting the use of a firearm during and in relation to that crime.

3. No justification exists to exempt from Section 924(c) those who intentionally join armed confederates in violent crimes or serious drug offenses

Nothing in the text or purpose of Section 924(c) indicates that Congress intended to establish a narrower, Section 924(c)-specific concept of aiding and abetting. To the contrary, four considerations particular to Section 924(c) fortify the conclusion that Congress intended Section 924(c)'s penalties to apply to persons who intentionally participate in violent crimes or drug trafficking, with the full knowledge that confederates will bring along firearms.

a. The core objectives of the original enactment of Section 924(c) and its expansion by successive Congresses would be ill-served by exempting those who intentionally perpetrate serious, dangerous crimes with the knowledge that their confederates will be armed. As this Court has explained, the "statute's basic purpose" is "to combat the 'dangerous combination' of 'drugs and guns'" (and violent crimes and guns). *Muscarello*, 524 U.S. at 132 (quoting *Smith*, 508 U.S. at 240). When Section 924(c) was originally enacted in 1968, the bill's sponsor explained that the provision sought "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Ibid.* (quoting 114 Cong. Rec. 22,231 (1968)).

That concern applies with no less force to a person who makes a concerted choice to participate in a sexual assault or a narcotics sale with an armed confederate, ignoring the tremendous increase in the potential for injury or death produced by the presence of a

firearm. Congress had no sensible reason to exclude such offenders from Section 924's compass. Many of the offenses covered by Section 924(c), such as robberies and drug deals, are often committed by groups of offenders acting in concert—as this case illustrates. Congress's effort to keep such situations gun-free would be thwarted if gangs and other violent groups knew that most participants could avoid the tough penalties of Section 924(c).

Indeed, in a statute that seeks to persuade violent criminals to commit their crimes in a less dangerous manner, it makes little sense to subject to special punishment only those unarmed individuals who happen to take some direct action with respect to the firearm. Petitioner has identified no plausible reason why Congress would have deemed a person who lends an associate a firearm to use in a drug deal more culpable than the person who arranges and actively participates in the deal knowing that his accomplice will employ a firearm.

Petitioner contends (Br. 48) that the government's position would expand the statute's deterrent effect to encompass participation in any violent crime or drug-trafficking crime, not only those that involve firearms. That does not follow. Application of Section 924(c) to those who knowingly participate in offenses intending to aid armed confederates would give potential wrongdoers a strong incentive to avoid committing a felony *involving firearms*, either by persuading their cohorts to leave their guns at home or by declining to provide aid to an offense when they know that a firearm will be involved. Petitioner's approach, by contrast, would undermine the statute's effectiveness by assuring criminal gangs and other joint offenders that

heightened penalties will apply only to the individuals carrying the firearms or those who facilitate the carriage in a direct way.

That would be misguided in a statute designed not to deter gun use per se, but rather to discourage the commission of serious crimes in a particularly dangerous way. As one Senator put it, "Section 924(c) comes with a message: 'If you mix guns and drugs, or guns and violence, we're going to come after you—and the price will be high.'" 144 Cong. Rec. 26,597 (1998) (statement of Sen. DeWine); see *Palma-Ruedas*, 121 F.3d at 863 (Alito, J., concurring in part and dissenting in part) (explaining that the statute's legislative history "confirms the critical importance of the element requiring proof that the defendant committed a crime of violence or drug trafficking offense."). That objective would be undercut if serious offenders could "mix guns and violence" with impunity as long as a confederate assumes the role of the triggerman.

Congress, moreover, was well aware when it expanded the breadth of Section 924(c) in 1998 that a defendant's facilitation or encouragement of a violent crime or drug-trafficking crime by an armed confederate would expose him to liability. See An Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469-3470 (1998). The 1998 amendment revised the statute to impose liability where a defendant possesses a firearm without actively employing it, responding to this Court's narrower construction of the "use or carry" prong in *Bailey* v. *United States*, 516 U.S. 137 (1995); see also *Abbott* v. *United States*, 131 S. Ct. 18, 25 (2010). At a hearing concerning a legislative response to *Bailey*, the Senate Judiciary Committee received written testimony

from a former Assistant U.S. Attorney arguing against a "mere possession" standard. See *Violent & Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong., 2d Sess. 31-32 (1996) (1996 Hearing). He was concerned that imposing liability for possession "during and relation to" the underlying crime could allow conviction for "simply having a gun and drugs in a home during the period of an offense." *Id.* at 32. Of particular relevance here, he explained that under pre-*Bailey* case law, "a girlfriend can be convicted of 924(c) for the mere possession of an unloaded gun by her boyfriend during the offense if at any time during the length of the conspiracy or the offense, she *aided and abetted his activities in even a minor way*." *Ibid.* (emphasis added).[6] The witness told the Committee that "these cases are routinely brought by prosecutors." *Ibid.*

Congress ultimately addressed the witness's practical concern by imposing a "slightly higher" nexus requirement ("in furtherance of") for the possession prong of Section 924(c). H.R. Rep. No. 344, 105th Cong., 1st Sess. 11 (1997). But Congress was clearly aware in 1998 that defendants could be liable as accomplices where they provided even "minor" aid in the underlying unlawful activities. Yet it chose to expand the coverage of the provision.

b. In addition to frustrating the basic objectives of the statute, petitioner's approach would produce substantial disparities in sentences imposed on similarly

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[6] Although the witness referred to "the reach of conspiracy laws," it is clear from his example that he also was adverting to "aiding and abetting" liability for actions in support of "the offense" rather than "the conspiracy." 1996 Hearing 32.

situated offenders without any discernible justification in their real conduct. Under petitioner's view, accomplices can jointly execute a violent crime with the shared understanding that one of them will brandish a firearm in order to subdue the victim, yet the unarmed assailant will escape punishment under Section 924(c) unless he physically provided another person with the gun or otherwise "facilitated" its use. That would reflect an entirely arbitrary scheme of criminal punishment. Indeed, the rationale for common-law accomplice liability was that those who participate in a criminal venture in even a small way share equal moral culpability with the primary offender. See Hawley & McGregor 80.

Petitioner's own examples illustrate the incompatibility of his approach with that bedrock principle. In a decision that petitioner offers as an exemplar of his approach (Br. 34-35), the Ninth Circuit reversed the conviction of a defendant who helped *plan* a jewelry-store robbery knowing that the plan called for confederates to brandish firearms to make the victims fear for their lives and then participated in the robbery. See *United States* v. *Nelson*, 137 F.3d 1094, 1100, 1103-1104, cert. denied, 525 U.S. 901 (1998); see also *United States* v. *Medina*, 32 F.3d 40, 42-43, 46 (2d Cir. 1994) (rejecting view "that a defendant aids and abets a violation of § 924(c) by planning a crime of violence with the knowledge that a firearm will be used"). It is inconceivable that Congress intended that a defendant who orchestrates an armed rape or robbery, and then actively participates in the commission of the offense, would be immune from liability for Section 924(c) because others were responsible for bringing the firearms.

Petitioner argues (Br. 42-49) that the government's position "severs the required connection between culpability and punishment" because "it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal." *Id.* at 42 (capitalization altered). But his argument rests on a fallacy: that the government's position would allow conviction even "if the defendant first became aware of the gun only at the moment it was discharged" and after he completed his active participation in the predicate crime. *Id.* at 14, 43. To establish accomplice liability, the government must prove that the defendant "acted with the intention of causing the [Section 924(c) offense] to be committed" by another. *United States* v. *Bindley*, 157 F.3d 1235, 1238 (10th Cir. 1998), cert. denied, 525 U.S. 1167 (1999). That requirement will not be met if the aider and abettor's participation ends when the gun appears.

Indeed, nowhere in petitioner's brief does he identify a circumstance in which it would be even arguably inequitable to subject a person who commits a violent crime or drug-trafficking crime with the foreknowledge that his confederate will commit the offense with a firearm to the same punishment as the confederate. Although the penalties for violating Section 924(c) are stiff, particularly when shots are fired, that is because the use of a firearm during robberies, rapes, assaults, and drug deals puts people's lives in danger.[7] Here, for example, regardless of

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[7] Nor is there anything inequitable about the fact that a defendant may not necessarily know before the crime that his cohort will discharge the weapon. This Court held in *Dean*, *supra*, that even an *accidental* discharge warrants the higher penalty. 556 U.S. at 578. The "fact that the actual discharge of a gun" may not have

whether petitioner or Joseph discharged the semiautomatic handgun, any number of innocent people could have been shot, including an elderly man who found a bullet near his porch; "[b]y pure luck, no one was killed or wounded." *Dean* v. *United States*, 556 U.S. 568, 577 (2009). Had the police not intercepted Perez's car, moreover, Gonzales himself might have been gunned down. Nothing inequitable results from punishing petitioner as if he had wielded the firearm himself.[h]

Petitioner relatedly argues (Br. 47) that the government's position does not accord with the Sentencing Guidelines, which "provide a relatively modest 2-level increase for defendants who participate in drug offenses knowing their confederates will be armed." That argument is misdirected. The Guidelines provision to which petitioner refers (without citing it) recommends a two-level increase in an offender's base offense level "[i]f a dangerous weapon (including a firearm) was possessed"—by the principal *or* a coconspirator. Sentencing Guidelines § 2D1.1(b)(1); see *id.* § 1B1.3(a)(1)(B) (imposing co-conspirator liability). Yet it could not be maintained that the provision suggests any impropriety in convicting the primary offender under Section 924(c) for possession of a firearm, even though absent the Section 924(c) conviction

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been anticipated by the defendant "does not mean that the defendant is blameless." *Id.* at 576.

[h] Petitioner argues (Br. 45) that the trial evidence is "consistent" with petitioner's "simple passivity throughout the drug sale." That claim—irrelevant to the question of instructional error—cannot be reconciled with the jury's verdict on Count 1 that petitioner, at minimum, aided and abetted the possession of the marijuana with intent to distribute. J.A. 202.

he could receive only a two-point increase for the firearm. The same holds true for an accomplice. Unlike Section 924(c), the Guidelines address possession without the same connection requirement (and of course do not require proof beyond a reasonable doubt), which explains why Section 2D1.1(b)(1)'s increase in offense level is less than the minimum sentences set forth in Section 924(c). And the Guidelines provision does not apply at all if the defendant is convicted under the higher standards of Section 924(c). See Sentencing Guidelines § 2K2.4, comment (n.4).

c. A requirement that an accomplice participating in a violent crime or drug offense directly facilitate the use or carriage of the firearm would generate a host of unanswerable questions for juries and courts. Although sometimes a defendant's conduct obviously facilitates the use or carriage of a firearm in a direct way, such as where he purchases the gun, that is often not true. When a person is already actively participating in a crime in which he knows that a firearm will be used to complete the offense, what conduct constitutes "facilitation" or "encouragement" of the use or carriage of the firearm will be exceedingly difficult to say with precision. Indeed, petitioner never offers anything close to an administrable definition of direct facilitation or encouragement of the use or carriage of a firearm.

If a person, for example, collects payment during a narcotics sale while his confederate displays a firearm to the buyer, has he facilitated the confederate's use of the firearm during and in relation to the drug-trafficking crime? *E.g.*, *United States* v. *Daniels*, 370 F.3d 689, 691-692 (7th Cir. 2004). It might, after all, be more difficult for the confederate to complete the

Section 924(c) "use" offense if he is required simultaneously to hold the firearm and to conduct the exchange; without the accomplice, he might be forced to keep the gun tucked into his waistband. See, *e.g.*, *Price*, 76 F.3d at 530 (holding facilitation requirement satisfied where confederate "pointed the gun while [the defendant] gathered the money"). And does the accomplice's implicit approval of the confederate's brandishing the firearm constitute "encouragement"? Asking juries to resolve these imponderables will produce irreconcilable verdicts and will inevitably reduce the public's confidence in the fairness of the justice system.

d. Finally, although petitioner emphasizes that the majority of courts of appeals have imposed a requirement that an accomplice facilitate the use or carriage of the firearm (Br. 31-32), most of those courts hold that an accomplice can be convicted upon proof that he merely "benefitted" from the weapon in some way. See *Daniels*, 370 F.3d at 691; see also *Medina*, 32 F.3d at 46 (permitting liability for benefitting from the weapon under a constructive-possession theory). Though not grounded in traditional aiding-and-abetting princples, that understanding—which petitioner evidently rejects (Br. 27, 47 n.11)—does not appear to differ in any practical way from the government's view that a defendant is liable if he actively participates in the offense with knowledge of the use or carriage of the firearm by a confederate. See Br. in Opp. 13. Under the approach of those courts, for example, "inspect[ing] the marijuana * * * under the watchful eye of [an] armed coconspirator" qualifies as facilitating the use of the gun. *Bazemore* v. *United States*, 138 F.3d 947, 950 (11th Cir. 1998).

And as petitioner has explained (Pet. 11-13), three courts of appeals have adopted the government's position outright. See *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007); *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997).

It appears, in fact, that every circuit other than the Ninth has, on some legal theory, upheld convictions of defendants who actively participated in a crime of violence or drug-trafficking crime with knowledge that an accomplice had a gun.[9] Judges who regularly examine the diverse array of dangerous encounters Congress intended to target with Section 924(c) have thus by and large concluded that the statute was intended to reach those who assist others in completing armed offenses.

B. Petitioner's Argument That The District Court Erroneously Instructed The Jury On The Intent Requirement For Accomplice Liability Was Forfeited And Lacks Merit In Any Event

For the reasons set forth above, accomplice liability under Section 924(c) does not require a defendant to directly facilitate or encourage the use of the firearm. Rather, the affirmative-act requirement for accomplice liability is met if a defendant actively participates in the crime of violence or drug-trafficking

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[9] See, *e.g.*, *United States* v. *Ramirez-Ferrer*, 82 F.3d 1149, 1154 (1st Cir.), cert. denied, 519 U.S. 973 (1996); *United States* v. *Gomez*, 580 F.3d 94, 103 (2d Cir. 2009); *Price*, 76 F.3d at 529-530 (3d Cir.); *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Kelley*, 441 Fed. Appx. 255, 256 (5th Cir. 2011); *United States* v. *Moore*, 572 F.3d 334, 341-342 (7th Cir. 2009); *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758 (8th Cir. 2007).

crime. That conclusion resolves the question presented.

The parties do not dispute what must be proved for the second, intent requirement: that the defendant's assistance was furnished with the intent to facilitate or encourage another's commission of the Section 924(c) offense. See Pet. Br. 13. As the Tenth Circuit has long held, the government must prove that the defendant "acted with the intention of causing the [Section 924(c) offense] to be committed." *Bindley*, 157 F.3d at 1238. Throughout his brief, however, petitioner appears to raise a claim that the particular jury instructions in this case did not adequately describe the intent requirement. See Pet. Br. 19-20, 27, 32, 33, 35, 38-39 & n.9, 41. He forfeited that objection by failing to raise it below, and it lacks merit in any event.

1. The district court instructed the jury on the intent requirement for accomplice liability in two ways. First, the court described to the jury the general intent requirement applicable to both the drug-possession count and the Section 924(c) count. Hewing closely to this Court's formulation, the court instructed the jury that "[i]n order to aid or abet another to commit a crime, it is necessary that the defendant *willfully and knowingly* associated himself in some way with the crime, and that he *willfully and knowingly* seeks by some act to *help make the crime succeed*." J.A. 196 (emphases added). The judge had previously defined the term "knowingly" to mean "that an act was done voluntarily and intentionally, not because of mistake or accident." J.A. 194.

The judge then explained how that general requirement applied to the Section 924(c) offense specif-

ically. He instructed the jury that to convict petitioner, it had to find that "(1) [petitioner] knew his cohort used a firearm in the drug trafficking crime, and (2) [petitioner] knowingly and actively participated in the drug trafficking crime." J.A. 196. The judge also instructed the jury that it could reach the Section 924(c) offense only if it convicted petitioner on the drug-possession count. J.A. 191. Accordingly, the jury, to convict petitioner under Section 924(c), was required to find that he had either committed the drug offense or intentionally assisted the armed confederate in that offense.

Petitioner did not argue in the district court that if the government was correct that active participation in the drug-trafficking crime satisfies the affirmative-act requirement, the instructions were independently deficient in their description of the intent requirement. In his written objection to the government's Section 924(c)-specific accomplice-liability instructions, in fact, he agreed with the government as to the first prong: "that the defendant knew his cohort used a firearm in the drug trafficking crime." J.A. 16-17. Although petitioner's proposed instruction on the second prong used the word "intentionally," that concerned only the volitional nature of the act of assisting the use of the firearm, not whether petitioner had the intent to help another person succeed in the overall Section 924(c) offense.

Nor did he raise any such argument on appeal, which argued in favor of the same instruction he proffered to the district court. See Pet. C.A. Br. 13-14. The court of appeals did not understand him to be challenging the intent aspect of the instructions. See Pet. App. 9a ("[Petitioner] argues that most other

circuits require jurors to find, additionally, that the defendant took some action to facilitate or encourage his cohort's use of the firearm."). He challenged the sufficiency of the evidence as to whether he "knew that a firearm was used in the underlying crime until after completion of its use," but he did not frame that as a claim of instructional error. Pet. C.A. Br. 17.

In his counseled certiorari petition, petitioner repeatedly characterized the issue as "whether aiding and abetting liability under 18 U.S.C. § 924(c) requires proof that the defendant facilitated or encouraged the principal's use of a firearm." Pet. 9; see also Pet. 14-17, 20, 24. Although the petition adverted to the alleged insufficiency of the evidence that petitioner knew about the firearm before it was fired, see Pet. 11-12, 25, it did not identify that factbound issue as an additional question warranting this Court's review. The petition did claim that the instruction failed to satisfy the intent requirement in addition to the affirmative-act requirement, but only insofar as the instruction did not require that petitioner "intentionally take some action to facilitate or encourage the use of the firearm." Pet. 22. Petitioner did not make the separate argument that, even if the government were correct that active participation satisfied the affirmative-act requirement, the instructions in this case allowed conviction without a determination that petitioner intended by that participation to help another person complete the Section 924(c) offense.

This Court should not address an issue that is neither squarely encompassed within the question presented nor necessary to an intelligent resolution of that question. See Sup. Ct. R. 15.2; *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325,

1336 (2011). At minimum, because petitioner did not object to the intent component of the instructions below, the claim should be reviewed for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 465-470 (1997).

2. a. In any event, the district court's intent instructions sufficiently conveyed to the jury that it could convict petitioner only if he "intended to facilitate or encourage the commission of [the Section 924(c)] offense." Pet. Br. 13. The general instruction stated that petitioner could be convicted if he intentionally sought "to help make the crime succeed." J.A. 196. And the specific instructions, particularly in conjunction with the instructions on the drug-possession count, made clear that petitioner had to have intended to assist the completion of the drug-trafficking crime and to have known that his confederate used a gun to commit that crime.

That adequately reflected the intent requirement for accomplice liability. When a defendant intentionally helps a confederate commit a crime of violence or drug-trafficking crime with the knowledge that the confederate is using a firearm to commit it, the intent requirement is met because the defendant intends by his assistance to help make the Section 924(c) offense succeed. That the defendant might have been personally indifferent to whether the confederate used a firearm to commit the crime does not absolve him of accomplice liability if he knew that the crime would be committed in that manner and nevertheless proceeded to furnish assistance. "[I]t has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared

that it would) make the principal's success more likely." *United States* v. *Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (Posner, J.); see *Bozza* v. *United States*, 330 U.S. 160, 164-165 (1947) (holding that a defendant aids and abets the crime of carrying on a distillery business with intent willfully to defraud the United States of taxes where he "actively helps to operate a secret distillery" and "*knows* that he is helping to violate Government revenue laws") (emphasis added); see also *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342, 347 (1870) ("Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a perpetrator in the guilt? * * * No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense."); see also *Pereira*, 347 U.S. at 12-13.[10]

Any other rule would be unsound. Even under petitioner's narrow view of the affirmative-act require-

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[10] See generally 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 120, at 95 (6th rev. ed., Phil., Kay & Brother 1868) ("If A. is charged with the offence, and B. is charged with aiding and abetting him, it is essential to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder."); *Tanner* v. *State*, 9 So. 613, 615 (Ala. 1891) ("[W]hen intent is one of the required constituent elements, the co-conspirator or accomplice, to authorize his conviction, must himself have entertained the intent, or must have known that the actor whom he was encouraging, aiding, or abetting entertained it."); cf. Clark & Marshall 245 ("When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent.").

ment, for example, a defendant who lends a firearm to another person to use in a rape is surely guilty of aiding and abetting the Section 924(c) offense if he has knowledge of the planned use of the gun, even if he does not care whether the other person commits the armed rape. Such a defendant intentionally furnishes assistance for a crime he knows another person intends to commit, which is all that is required for aiding and abetting.

At minimum, whatever theoretical difference exists between, on the one hand, intending that a confederate use a firearm to commit an offense and, on the other hand, intending that a confederate commit an offense knowing that he will use a firearm to do it would not establish that the district court here committed plain error.

b. Petitioner essentially lodges two objections relating to the intent component of the district court's instructions: (i) that a defendant could be convicted if he "learned of the gun's presence only as it was being used" (Pet. Br. 4); and (ii) that a "defendant would be liable even if he discouraged or sought to prevent [the firearm's] use" by the principal (*id.* at 41). Neither has merit.

a. With respect to the first argument, the government does not contend that a person could be convicted of aiding and abetting a Section 924(c) offense if he completed his assistance before learning that a confederate had a firearm. But petitioner does not contest that if petitioner *continued* his intentional facilitation or encouragement after learning of the use of the gun in the drug-trafficking crime, that suffices for accomplice liability. For example, if a bank robber learns of a confederate's use of a gun mid-robbery and

continues to intentionally participate in what he now knows to be an armed offense, he is guilty of aiding and abetting the confederate's Section 924(c) violation. *E.g.*, *Price*, 76 F.3d at 527-530.

Here, the district court's instructions did not suggest that petitioner could be convicted if he learned of the gun only after his affirmative act of facilitation or encouragement was completed. The court's knowledge instruction ("the defendant knew his cohort used a firearm in the drug trafficking crime," J.A. 196) would not lead a reasonable jury to believe that a defendant could be convicted if he "knew" of the use only after his role in the criminal venture was completed, although it would have been clearer had the court said "would use" rather than "used." This Court does not evaluate jury instructions "in isolation but in the context of the entire charge," *Jones* v. *United States*, 527 U.S. 373, 391 (1999), which here includes the umbrella instruction requiring petitioner to have "*willfully and knowingly* [sought] by some act to help make the crime succeed." J.A. 196 (emphasis added). The district court's conjugation choice certainly does not rise to the level of plain error. Indeed, petitioner's own proposed knowledge instruction was worded the same way, J.A. 14, yet he surely did not believe that it would encompass knowledge of the drug-trafficking crime gained only after completion of his facilitation or encouragement of the use of the firearm. Petitioner's newly minted complaint that the knowledge instruction was not sufficiently "explicit" on the point (Br. 43 n.10) was therefore waived through his "affirmative approval," precluding even plain-error review. *United States* v. *Natale*, 719 F.3d 719, 729 (7th Cir. 2013).

Petitioner points to the prosecutor's remark in summation that "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158. That unobjected-to comment, which petitioner did not cite before the court of appeals, may have simply reflected the fact that both of petitioner's accomplices testified at trial that when Gonzales fled the vehicle and the shooting began, all three occupants exited the vehicle, J.A. 109, 125, and then, "[a]fter the shooting stopped, * * * everybody jumped back in the car" and took off "trying to catch up to the other guys that took the stuff," J.A. 109; see also J.A. 126-127. Even if he was not the shooter, petitioner's intentional participation in the drug-trafficking crime continued when he reentered the vehicle to "chas[e]" the men who had stolen his marijuana. J.A. 109.[11] In any event, a prosecutor's unchallenged statement in summation could not taint a proper instruction by the district court.

b. Petitioner's claim that the government's position would permit a defendant's conviction "even if he discouraged or sought to prevent [the firearm's] use" (Pet. Br. 41) is true but incomplete. What is required for conviction is that, with full knowledge that the principal intends to use a firearm during and in relation to the offense, the defendant proceeds intentionally to assist the principal complete the offense, despite any reservations about the firearm. See *Central Bank of Denver*, 511 U.S. at 181 (explaining that Section 2(a) punishes "those who provide knowing aid to

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[11] The possession of a controlled substance with intent to distribute it is a continuing offense. See, *e.g.*, *United States* v. *Zidell*, 323 F.3d 412, 422 (6th Cir. 2003), cert. denied, 540 U.S. 824 (2004).

persons committing federal crimes, with the intent to facilitate the crime"). A defendant's intentional participation in another's armed crime of violence or drug-trafficking crime is not exempt from Section 924(c) because he verbally urges the other person not to use a gun. A getaway driver, for example, could not avoid accomplice liability because he urged his confederates not to rob the bank as he drove them to its front door.

Any other view would not comport with Congress's objectives in enacting Section 924(c) or a rational system of criminal punishment. Petitioner appears to believe that if, for example, a defendant admitted to orchestrating and perpetrating a sexual assault of a child, see 18 U.S.C. 2241(c) (Supp. V 2011), with the full knowledge that a confederate would use a firearm to subdue the victim, he would not be subject to accomplice liability under Section 924(c) if he discouraged—or even secretly disapproved of—the accomplice's use of the firearm. Petitioner cites no decision of this Court construing an intent requirement in that way, and Congress could not have meant to exclude such offenders from the Section 924(c) penalty. Rather, as discussed above, when a defendant intentionally joins in a crime of violence or drug-trafficking crime with the knowledge that a confederate will use a firearm during and in relation to that crime, he has "participate[d] in [the Section 924(c) offense] as in something that he wishes to bring about." *Nye & Nissen*, 336 U.S. at 619 (citation omitted).

II. ANY INSTRUCTIONAL ERROR WAS HARMLESS

Even if the district court erred in failing to instruct the jury that it had to find that petitioner had facilitated the principal's use of the firearm, the error would be harmless beyond a reasonable doubt. See *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010); *Neder* v. *United States*, 527 U.S. 1, 15 (1999). Accordingly, this Court should either exercise its discretion to hold that the error was harmless or remand to the court of appeals for a determination of harmlessness in the first instance. See, *e.g.*, *Skilling*, 130 S. Ct. at 2935.[12]

The jury found petitioner guilty on Count 3 of possession of ammunition by a previously convicted felon and on Count 4 of possession of ammunition by an illegal alien. Each of those counts was based on his possession of shell casings matching the gun that was fired at Gonzales. See Pet. App. 29a-30a; J.A. 12-13. The jury was not charged on aiding and abetting for either count. And the government's only argument to the jury on those counts was that, because the evidence established petitioner's "possession of the 9 millimeter firearm," it necessarily "establishe[d] beyond a reasonable doubt that he had to have also possessed the cartridge cases that were inside the 9 millimeter that he possessed." J.A. 159; see also *ibid.* ("So based on the government's evidence regarding the defendant's possession of the firearm and, there-

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[12] Given the clarity of Tenth Circuit precedent, the government did not raise a harmless-error argument below. But because the government raised the issue in its brief in opposition, and for the reasons set forth below, the government respectfully urges the Court to exercise its discretion to reach the issue if it finds an instructional error or remand to the court of appeals.

fore, his necessary possession of the cartridge cases, * * * I would ask you also to return a verdict of guilty on Counts Three and Four.").

The jury's guilty verdict on those counts thus demonstrates beyond a reasonable doubt that the jury found that petitioner was the shooter. The jury's conclusion was amply justified by the trial evidence, including Joseph's testimony that petitioner had discharged the handgun. Pet. App. 3a; J.A. 123-124.

But even if evidence had been presented that petitioner possessed ammunition fired by someone else, that conduct would readily qualify as facilitation of the use of the firearm under any conceivable standard. Under even the narrowest view of facilitation, the provision of ammunition to the principal would be aiding and abetting. The jury's guilty verdict on Counts 3 and 4 therefore demonstrates that the asserted instructional error was harmless beyond a reasonable doubt because the jury "necessarily found the element as to which the jury had been mischarged." *United States* v. *Green*, 254 F.3d 167, 170 (D.C. Cir. 2001).

Petitioner contends (Br. 55-56) that the district court's aiding-and-abetting instruction on Counts 1 and 2 could have prompted the jury to mistakenly convict him on Counts 3 and 4 for a confederate's possession of the ammunition in the gun. That argument is flawed. This Court "presum[es] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case." *United States* v. *Olano*, 507 U.S. 725, 740-741 (1993). The instructions never suggested that a finding of liability on the Section 924(c) offense under an aiding-and-abetting theory would require a

finding that petitioner possessed ammunition. See J.A. 196-200. To the contrary, the court told the jurors that conviction for aiding and abetting requires a finding that "that *another person* actually committed the offense with which the defendant is charged"—*i.e.*, that another person used or carried the firearm. J.A. 195 (emphasis added). The instructions could not reasonably be read to provide that because petitioner aided and abetted *another's* use or carriage of a firearm during and in relation to a drug transaction through his participation in that transaction, he must have possessed the ammunition inside the firearm *himself*. Nor did petitioner object in the district court that the aiding-and-abetting instructions had the potential to confuse the jurors on the ammunition-possession counts.

In short, the jury's conclusion that petitioner possessed the very ammunition loaded into the gun that was fired during the drug transaction demonstrates beyond a reasonable doubt that any instructional error on aiding and abetting was harmless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2013

STATUTORY APPENDIX

1. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided

for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Pro-*

vided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsec-

tion, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by im-

prisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to

acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more

than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

REPLY BRIEF

No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government begins its argument by acknowledging that "accomplice liability under [18 U.S.C. §] 2(a) has two requirements: 'that the defendant (1) *affirmatively acted* to facilitate or encourage commission of *the offense he is accused of aiding and abetting*; and that he (2) *intended* to facilitate or encourage the commission of that offense.'" U.S.Br. 14 (quoting Pet.Br. 13; second emphasis added). It then spends forty pages rationalizing the decision to ask the jury instead whether Rosemond (1) facilitated a *different* crime—a "distinct" and lesser drug trafficking offense. *Castillo* v. *United States*, 530 U.S. 120, 125 (2000), and (2) acted with a *different mens rea*—after-acquired "knowledge" of the firearm, rather than the specific intent to facilitate the firearm's use. The government breathlessly claims that requiring proof that the defendant intentionally facilitated the firearm's use during and in relation to a drug trafficking crime, see 18 U.S.C. § 924(c)—the actual crime of conviction—would bestow "special immunity from accomplice liability," U.S.Br. 31.

Nonsense. It is the government that seeks an exemption from what it concedes are ordinary principles of accomplice liability. As "eight of the eleven circuits to consider the issue," U.S.Br. 12, have concluded (not just the Ninth Circuit, *id.* at 26, 42), fulfilling the two bedrock requirements of accessory liability requires proof the defendant facilitated the distinct Section 924(c) offense, and did so intentionally. Compliance with those two essential requirements is necessary to ensure that the severe

penalties of Section 924(c)—mandatory, consecutive terms of between five years' and life imprisonment—punish an additional offense, and do not simply penalize the defendant twice for the same crime.

The government's brief is most remarkable for its efforts to change the subject. The government *treats* this case like it involved a conspiracy Rosemond joined with full foreknowledge of an agreed-upon plan to use the gun during the offense. Thus every government example hypothesizes offenders acting with "full knowledge" (U.S.Br. 33, 50, 51) of a confederate's plans, purposefully engaging in unequivocal acts to facilitate horrific crimes, *id.* at 30-31, 32, 33, 33-34, 35, 38, 42, 46, 50, 51—frequently, armed sexual assault, *id.* at 32, 33, 37, 38, 48, 51.[1] But this case is noteworthy for the complete absence of evidence that petitioner knew beforehand that Ronald Joseph had brought a gun to the sale of what the government itself deemed a "measly" amount of poor-quality marijuana. J.A. 207, 93—an offense unlikely to involve a weapon of any kind[2]—and for the meager

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[1] The government's brief recites nearly as many instances of armed sexual assault as federal courts have seen during the last five years. Of the 11,962 defendants sentenced for Section 924(c)) offenses during 2008-2012, eight were convicted of sexual abuse, and 6,207 of a drug trafficking offense. U.S. Sentencing Comm'n, 2008-2012 Datafiles, *available at* http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm.

[2] At the time Rosemond was sentenced, only 7.3% of marijuana offenses involved any kind of weapon; just 4.07% implicated Section 924(c)). See U.S. Sentencing Comm'n, *Annual Reports*, tbl. 39 (2011), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table39.pdf; U.S. Sentencing Comm'n, 2011 Datafile,

evidence that petitioner acted to facilitate any offense after learning of the gun's use.

Partly, this reflects the government's appreciation that it cannot win on the facts of *this* case. But it also reflects an effort to abstract away a basic reason courts have insisted on high standards of proof for accessory liability: "[B]ecause there is generally more ambiguity in the overt conduct engaged in by the accomplice [than the principal], and thus a higher risk of convicting the innocent." Model Penal Code ("MPC") § 2.06 cmt. at 312 n.42 (1985), courts traditionally have demanded clear proof of facilitation and a high *mens rea* standard to punish accessories. Cf. *United States* v. *Manatau*, 647 F.3d 1048 (10th Cir. 2011) (Gorsuch, J.) ("proof of intent" rather than "lesser *mens rea*" used for accessories because of more "tangential[]" involvement in offense); *People* v. *Mendoza*, 959 P.2d 735 (Cal. 1998) (further act and specific intent necessary because accessories' conduct "often" "innocuous"). The culpability of someone who discharges a gun in public is apparent; the culpability of those surrounding him is less clear. But while the government can assume away difficulties of proof, courts cannot. And though the government almost completely avoids discussing the facts of this case, Rosemond's experience illustrates the dangers of the Tenth Circuit's minimal standard. Rosemond's Section 924(c) conviction must be reversed.

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available at http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm.

A. The Tenth Circuit's Rule Eliminates The Required Mental State

1. The Government's Concession Requires Reversal

The government now agrees that it must show that the defendant had the requisite mental state *before* committing the act of facilitation that subjects him to accomplice liability:

> A defendant who does not know that his confederate intends to bring along a firearm to a violent crime or drug transaction when he completes his intentional act of facilitation or encouragement is not guilty of aiding and abetting a Section 924(c) offense, though he is guilty of aiding and abetting the underlying crime.

U.S.Br. 30. While the government mistakenly contends that *knowledge* that the principal has a firearm is enough for liability, *id.* at 46-47; but see pp. 5-11, *infra*, even if it were right, its concession that *mens rea* must precede facilitation alone requires reversal.

The (government-proposed) instruction required only that "the defendant *knew* his cohort *used* a firearm in the drug trafficking crime"—past tense, J.A. 196 (emphasis added). While the government dismisses that as a "conjugation choice," U.S.Br. 49, it recognizes that its instruction failed to clearly indicate knowledge must precede facilitation, *ibid.*[3]

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[3] Although the government argues that Rosemond's "own proposed knowledge instruction" was worded similarly, U.S.Br. 49, its requirement of "intentional[] * * * action to facilitate" the firearm's use, J.A. 14, necessarily implied prior knowledge.

The government exploited that understanding, arguing that Rosemond had the requisite knowledge because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158.

It is impossible to "confidently say" that error "did not contribute to the verdict." *Neder* v. *United States*, 527 U.S. 1 (1999). The government presented *no evidence* that anyone but the shooter knew of the gun beforehand, and *never* argued that Rosemond's actions afterward facilitated a confederate's crimes; it argued only that his actions suggested he was the shooter. J.A. 156. Indeed, the government elicited testimony that as the shooter tried to hide the gun, the other passenger refused to touch it. J.A. 111, 134. Although Rosemond argued on appeal that there was no evidence he knew of the firearm until the crime was complete, Pet.C.A. Br. 17-19, the government argued it was enough that "Rosemond was in the immediate vicinity[] [when] one of Rosemond's cohorts fired several gunshots," U.S.C.A.Br. 12. The government *first argued* in its brief in opposition that Rosemond's facilitation continued after the gun's discharge; even then, it maintained that "the absence of *advance* knowledge" was permissible so long as Rosemond "had knowledge of the firearm before the underlying crime was *completed*." Br. Opp. 9-10.

2. The Government Must Show Intentional Facilitation, Not Simply Knowledge

The government agrees that the defendant's assistance must be "furnished with the *intent* to facilitate or encourage another's commission of the Section 924(c) offense." U.S.Br. 43 (emphasis added).

But it contends that "intent" means something *less* than "intent," pronouncing categorically that "[i]t has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely." *Id.* at 46-47 (quoting *United States* v. *Ortega*, 44 F.3d 505 (7th Cir. 1995)). At times, the government attempts to dilute the showing further, saying it suffices simply to know that a confederate is *armed*, U.S.Br. 25, 33, rather than that he plans to use a firearm.

That is not so. To be sure, "[t]here is some authority to the effect that one may become an accomplice by giving encouragement or assistance with knowledge that it will promote or facilitate a crime, *although liability has seldom been imposed on this basis.*" 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(b) (2d ed. 2003) (emphasis added). "[T]he usual requirement [is] that the accomplice must intentionally assist or encourage"—that is, "the accomplice must intend that his acts have the effect of assisting or encouraging another." *Id.* § 13.2(c); accord Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 346 (1985) ("[T]he law of complicity generally requires that the [accomplice] * * * must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime."; "if that was not his purpose, he is not liable."). "[A]lthough dictum to the contrary still persists," 2 LaFave § 13.2(d), "[t]he dominant approach in the federal system * * * has been to

follow [*United States* v.] *Peoni*," 100 F.2d 401 (2d Cir. 1938). Learned Hand's classic formulation of accessory liability requiring proof of a purpose to facilitate rather than basing liability on the accessory's "knowledge of the perpetrator's criminal intent." Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. Cal. L. Rev. 2169, 2176-2177 & n.32 (1988); *id.* at 2174 ("the *mens rea* most often mentioned in the statutes and explicit in the common law is the intent to promote"); see also MPC § 2.06 cmt. at 316 (1985) (equating *Peoni* with "purpose of promoting"); 2 LaFave § 13.2(e) (similar).

There is no reason to believe that Congress intended to depart from this dominant view. Indeed, before Congress adopted the predecessor of Section 2, this Court reversed a conviction because the jury instruction did not require proof that the defendant acted "with the intention of encouraging and abetting" a crime, emphasizing that action "for a different purpose" that has "the actual effect of inciting" is insufficient for accessory liability. *Hicks* v. *United States*, 150 U.S. 442, 449 (1893). And this Court has repeatedly cited *Peoni* in describing the mental state necessary for accessory liability. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949).

The cases the government cites (U.S.Br. 13, 47) are not to the contrary. *Ortega* itself recognized *Peoni* as "the canonical definition of aiding and abetting a federal offense," that by its terms requires that the accessory must "have some actual desire for his principal to succeed." 44 F.3d at 507-508. *Ortega*

only observed that, as a practical matter in the "administration of the law," *id.* at 508, "intent can be inferred from the natural consequences of [a defendant's] knowing acts." *United States* v. *Irwin*, 149 F.3d 565 (7th Cir. 1998). But the Seventh Circuit *explicitly rejected* that *Ortega* held that "knowledge of the crime and any assistance is sufficient to prove aiding and abetting," saying "[n]one of our prior cases has suggested this is the appropriate test." *Ibid.* *Bozza* v. *United States*, 330 U.S. 160 (1947), likewise stands for the proposition that in appropriate circumstances, a jury may "draw[] inferences as to fraudulent *purposes* from th[e] circumstances" surrounding an offense, *id.* at 165 (emphasis added); and two Terms later, this Court embraced *Peoni*'s purpose test in *Nye & Nissen*.[4]

The government is wrong to dismiss the difference between intent and knowledge as "theoretical." U.S.Br. 48. While knowledge is *relevant*, intent "is not identical with mere knowledge that another purposes unlawful action." *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). "[A]id rendered with guilty knowledge implies purpose

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[4] *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342 (1870), did not address the requisite *mens rea* to uphold a criminal conviction: it was a *civil* action seeking payment for supplies provided the Confederate army. This Court held only that "[a]ny contract, tinctured with the vice of giving aid and support to the rebellion, can receive no countenance or sanction from the courts of the country" and is unenforceable. *Id.* at 345. The portion of *Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954), that the government cites (U.S.Br. 47), concerns *conspiracy* liability, not aiding and abetting.

[when] it has no other motivation." MPC § 2.06 cmt. at 316. While that may be the case for the getaway driver who "urged his confederates not to rob the bank as he drove them to its front door," U.S.Br. 51, because there was no other purpose for his actions, the difference can be significant when factors besides a purpose to further criminality animate conduct (*e.g.*, mistaken judgment about the principal's intentions, a failed effort to discourage conduct or intercede on behalf of a victim, or an effort to flee unexpected violence). For example, the defendant who spends the short drive to a convenience store trying to persuade a friend to leave his gun behind when shoplifting is certainly less culpable than the principal who pulls it when confronted stealing. While the accessory may have facilitated shoplifting by saving the principal the short walk, imposing full liability for an armed robbery he sought to prevent conflicts with basic principles of culpability and eliminates incentives for those who seek to discourage such behavior.

3. Requiring Purposeful Intent Serves Important Interests

The government's exclusive focus on hypotheticals involving advance knowledge and agreed-upon plans seeks to minimize one of the principal reasons courts have made proof of intent the consensus requirement for accessory liability: A *mens rea* greater than simple knowledge is necessary "because there is generally more ambiguity in the overt conduct engaged in by the accomplice [than the principal], and thus a higher risk of convicting the innocent." MPC § 2.06 cmt. at 312 n.42. The "knowledge"

standard is especially open to abuse, because prosecutors rarely limit themselves to bringing cases involving clear proof of *actual* knowledge, and "the law often permits probabilistic judgments to count as knowledge." *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2073 (2011) (Kennedy, J., dissenting); *United States* v. *Spinney*, 65 F.3d 231 (1st Cir. 1995) ("knowledge" encompasses "continuum" of awareness from "actual knowledge" to "constructive knowledge" tantamount to negligence); see also 2 LaFave § 13.2(d) ("'wilful blindness' would suffice as a mental state for accomplice liability" under knowledge standard).

Courts have also widely rejected a "knowledge" standard "in order not to include situations where liability was inappropriate." MPC § 2.06 cmt. at 318. That category includes lawful transactions that a businessperson may suspect will facilitate crime (*e.g.*, selling condoms to a suspected prostitute; providing a taxi ride to a suspected drug buyer; selling lithium batteries potentially usable to make methamphetamine). *Ibid.* But it also includes imposing liability *as principals* on substantially less-culpable accessories. That risk is especially pronounced for offenses like Section 924(c), where a defendant confronting a substantial sentence for a predicate offense could face a second conviction for the *same conduct*, based only on suspicion that he knew of *possible* additional criminality.

The government does not deny that its theory would permit imposition of "drug kingpin" liability for a defendant's single drug transaction with someone suspected of being a significant dealer. See Pet.Br.

37-38. By the same token, facilitating a single transaction involving any of numerous RICO predicate crimes with a suspected gang member could yield racketeering liability; helping a friend place one bet with someone suspected of running a numbers game could make him an accomplice to a gambling operation. *id.* at 41-42. The government's theory would thereby subject minor players that a jury might (with hindsight) deem to have had "knowledge" of wider criminal operations to the extraordinary sentences usually reserved for criminal masterminds.

4. The Intent Instruction Is Squarely Before This Court

Appreciating that its concession makes Rosemond's Section 924(c) conviction untenable, the government argues that he did not object to the adequacy of the intent instruction. U.S.Br. 45. The government has itself waived that argument by not raising it in its brief in opposition. See Sup. Ct. R. 15.2. In any event, it is not a serious argument. Rosemond objected at trial that the "second prong of [the instruction's] test" required only that "the defendant knowingly and actively participated in the drug trafficking crime," rather than he *intentionally* facilitated the firearm's use. J.A. 17. Rosemond supported his request by citing cases discussing the *mens rea* for accomplice liability, quoting *United States* v. *Daniels*, 370 F.3d 689 (7th Cir. 2004), for the proposition that the government must prove that the defendant, "after acquiring knowledge[,] intentionally facilitate[d] the weapon's possession or use." J.A. 14-15.

On appeal, Rosemond argued that "[a] *mens rea* of knowledge * * * falls short of the mark," Pet.C.A. Reply 10, "exposing defendants who have no intent that the charged offense be committed and take no action to further [it] to severe penalties," *id.* at 11; Pet.C.A. Br. 13-18. Rosemond argued that "once he became aware that the firearm had been discharged, he took no subsequent action in relation to the weapon." Pet.C.A. Reply 9. The government did not argue that claim was forfeited, just that after-acquired knowledge was enough, asserting "there was sufficient evidence of this knowledge based on the testimony" that when "Rosemond was in the immediate vicinity, one of Rosemond's cohorts fired several gunshots." U.S.C.A. Br. 12.

And it is plain from reviewing the actual question presented, rather than the government's excerpt, U.S.Br. 15, that the petition raised both facilitation and the required mental state, framing the issue as whether a Section 924(c) conviction requires a showing of "*intentional* facilitation or encouragement" of the firearm's use, or whether conviction can be based on "simple knowledge that the principal used a firearm" during a predicate offense. Pet. I (emphasis added). The petition faulted the Tenth Circuit's rule because it "requires *neither*" of the "two requirements of aiding and abetting liability," proof that the defendant "(a) gave assistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime." Pet. 22 (quoting 2 LaFave § 13.2); *id.* at 21 (similar); Pet. Reply 11. The government responded to Rosemond's argument that the Tenth Circuit's rule allowed conviction "even

where the defendant has no 'advance knowledge' of the firearm," Br. Opp. 9, not by arguing waiver, but by saying that rule is correct: "the absence of *advance* knowledge" is permissible so long as the defendant knew of the firearm "before the underlying crime was *completed*," *id.* at 9-10.

B. The Jury Was Not Required To Find That Rosemond Facilitated The Section 924(c) Offense

The government concedes that accomplice liability requires a jury finding that the defendant "*affirmatively acted* to facilitate" *the crime of conviction*—using a firearm during and in relation to a drug trafficking crime.[5] U.S.Br. 14. It offers two rationales for why it was enough here simply to ask the jury whether Rosemond committed the "distinct" drug trafficking crime, *Castillo*, 530 U.S. at 125: (1) a defendant need not participate in every aspect of a crime to be guilty of aiding and abetting it; and (2) the drug crime is an element of a Section 924(c)

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[5] While the government acknowledges the defendant must abet the *crime of conviction*, it suggests that facilitating "a general felonious plan * * * is enough to make a man an [accomplice]," U.S.Br. 10 (internal quotation marks omitted); cf. *ibid.* (facilitating "criminal venture"). But the government's own source makes clear that the dispositive inquiry is whether the defendant gives aid "to the *particular act*." 1 Francis Wharton, *A Treatise on the Criminal Law* § 211a, at 229 (10th ed., Philadelphia, Kay & Brother 1896) (emphasis added). The inquiry is not "whether the defendant is * * *, in general, an accomplice of another * * *; rather, it is the much more pointed question of whether the requisites for accomplice liability are met for the particular crime." MPC § 2.06 cmt at 306.

offense. Neither point is disputed. Neither is relevant.

While a defendant need not participate in *every aspect* of a crime to be an accessory, the jury still must find that he "*affirmatively acted* to facilitate" the *offense of conviction*, U.S.Br. 14, not some other crime. The Tenth Circuit requires only a finding that the defendant participated in a drug trafficking offense, not that he facilitated the distinct crime of using a firearm during and in relation to the predicate offense. That rule thus conclusively presumes facilitation of a Section 924(c) offense from mere participation in a predicate crime. But a jury determination that a person performed conduct satisfying one element of an offense does not mean he has "facilitated" or "encouraged" the complete crime. That is particularly true where, as here, the element is itself a freestanding crime that serves as a predicate for a distinct, additional offense.

1. Commission Of A Predicate Offense Does Not "Facilitate" Or "Encourage" The Section 924(c) Offense

It has been understood since common law that a person who abets one offense is not, without more, liable if the principal *also* commits an additional crime—even if the first offense satisfies an element of the additional crime: "if *A.* commands *B.* to steal a plate, and *B.* commits burglary to steal the plate, *A.* is accessary to the theft, but not to the burglary." 1 Matthew Hale, *The History of the Pleas of the Crown* 617 (Sollom Emlyn ed., London 1736); 1 William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 187, at 384-385 (1900) (similar). Courts

similarly have held that involvement in a predicate offense does not prove intentional facilitation of an additional crime. *E.g.*, *United States* v. *Lombardi*, 138 F.3d 559 (5th Cir. 1998) (evidence defendant "aid[ed] and abet[ted] the overall drug trafficking scheme" does not show he "share[d] in the intent to commit," or "play[ed] an active role in [the] commission" of, separate crime of using minor in drug offense, 21 U.S.C. § 861(a)(1)).

Thus, as Judge O'Scannlain explained, to demonstrate that a defendant aided and abetted an offense incorporating a separately punishable predicate offense, the government must provide "discrete proof of the accomplice's intentional abetment" of the "essential element" that "aggravates the crime from a less serious to a more serious offense" or that "by itself imposes an additional criminal offense." *United States* v. *Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002); cf. *United States* v. *Jones*, 678 F.2d 102 (9th Cir. 1982) ("[W]here a defendant is charged with aiding and abetting a crime involving an element which enhances or aggravates the offense, there must be proof that the defendant associated herself with and participated in both elements.") (internal quotation marks omitted); *id.* at 106 (Kennedy, J., concurring) (suggesting that accomplice liability for aggravated bank robbery requires, in addition to facilitation, "more than an intent to commit a bank robbery"); *United States* v. *Garcia*, 567 F.3d 721 (5th Cir. 2009) (same). Courts have applied this principle in a variety of contexts. *E.g.*, *United States* v. *Capers*, 708 F.3d 1286 (11th Cir. 2013) ("[I]n a prosecution for aiding and abetting possession of [narcotics] with

intent to distribute, there must be evidence connecting the defendant with both aspects of the crime, possession and intent to distribute."); *Lombardi*, 138 F.3d at 561-562 (using minor in drug offense); cf. *United States* v. *Hill*, 55 F.3d 1197 (6th Cir. 1995) (accomplice liability for gambling operations under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction").

The majority rule represents a straightforward application of this principle. It follows not from any mistaken idea that using a firearm is "the only significant element in a Section 924(c) offense," U.S.Br. 26, but from the fact that Section 924(c) established an "entirely new crime[]" that is "distinct from the underlying federal felony," *Castillo*, 530 U.S. at 125, because it addresses something different—"us[ing] a gun in the circumstances described," *Watson* v. *United States*, 552 U.S. 74 (2007). While the jury's finding here on the drug offense demonstrated facilitation of the predicate crime, see J.A. 191, additional proof of facilitation is necessary to establish the distinct conduct underlying Section 924(c). The government *itself* has recognized that: As the Seventh Circuit observed in adopting the majority rule, "[t]he government agrees that to be convicted of aiding and abetting a § 924(c) violation, the defendant must aid and abet the use or carrying of the firearm. Merely aiding the underlying crime and knowing that a gun would be used or carried cannot support a conviction under 18 U.S.C. § 924(c)." *United States* v. *Woods*, 148 F.3d 843, 848 (7th Cir. 1998) (citations omitted).

The government concedes that participation in a drug offense "does not necessarily facilitate or encourage the use of the firearm in a specific way." U.S.Br. 25. But in a passage that virtually makes the paper blush, the government asserts that the drug offense "facilitates the gun's use during and in relation to a * * * drug trafficking crime" because the principal, "despite his use or carriage of the firearm, could not commit the Section 924(c) offense without" the predicate offense. *Id.* at 25-26. Under that reasoning, those who build schools "facilitate or encourage" the sale of drugs within 1000 feet of them, 21 U.S.C. § 860(a), because drug dealers "could not commit the Section [860(a)] offense without the[m]." U.S.Br. 26. In both instances, the conduct creates "circumstances" supporting additional liability, see *Watson*, 552 U.S. at 81; but in no conventional sense does that conduct "give help or support to" (aid) or "incite, encourage, instigate, or countenance" (abet) the further criminal offense. *Webster's Third New International Dictionary* 44, 3 (2002).

2. The Government's Authorities Do Not Support The Tenth Circuit's Rule

Nothing in *United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999), suggests that evidence a defendant committed a predicate felony proves he "aided and abetted" a Section 924(c) violation. Contra U.S.Br. 26-29. That case involved the very different inquiry into the propriety of laying venue in a particular district, which turns on the "unfairness and hardship [of] trial in an environment alien to the accused." *United States* v. *Johnson*, 323 U.S. 273 (1944). The facilitation requirement serves the very

different purpose of proving the defendant's culpable participation by "unmistakably evinc[ing] a design to encourage, incite," or aid a criminal offense. Francis Wharton, *A Treatise on the Law of Homicide* § 333 (Philadelphia 1875). The government has not demonstrated that the minimal showing necessary to satisfy venue requirements, *e.g.*, *United States* v. *Abdallah*, No. 12-0409, 2013 WL 3198163, *2 (2d Cir. June 26, 2013) (single telephone call suffices to establish venue for wire fraud), would ensure the defendant has acted to facilitate the "distinct" and "entirely new" offense of conviction, *Castillo*, 530 U.S. at 125.

The government's attempt to demonstrate that an accessory can be liable for a principal's "further crime" without additional facilitation (U.S.Br. 30-31) is a bust. Both of its examples involve aggravated forms of a single offense, rather than (as here) distinct crimes. The government overlooks (*id.* at 31) that courts widely require that accessories to drug distribution "must have aided both the possession and the intent to distribute." *Lombardi*, 138 F.3d at 561; *Capers*, 708 F.3d at 1306-1307; *United States* v. *Graves*, No. 93-5116, 1994 WL 548899, *2 (4th Cir. Oct. 7, 1994). The government acknowledges that some courts require proof a defendant assisted the use of a gun to support conviction for abetting the aggravated offense of armed bank robbery (18 U.S.C. § 2113(d)), U.S.Br. 31, but overlooks that cases on *its* side of the issue distinguish between the proof appropriate for Section 2113(d) and Section 924(c), because the latter imposes an additional conviction (and consecutive sentence) and applies to crimes that

are less likely than bank robbery to involve firearms, *e.g.*, *United States* v. *Spinney*, 65 F.3d 231 n.8 (1st Cir. 1995); see also *Woods*, 148 F.3d at 848.

That *conspiracy* doctrine supports liability for a "confederate's further crime" without showing the defendant's intentional facilitation, U.S.Br. 30 n.4 (citing *Pinkerton* v. *United States*, 328 U.S. 640 (1946)), counsels *against* imposing such broad liability here. Accessory liability, which derives from the defendant's *own* acts and intent, is analytically much different than the agency theory based on prior agreement that allows co-conspirators to be punished for acts they did not personally facilitate. Indeed, one reason courts have refused to equate a defendant's participation in a predicate offense with facilitating an additional offense is that "the difference between conspiracy * * * and aiding and abetting would cease to exist." *Lombardi*, 138 F.3d at 561.

C. The Majority Rule Does Not Grant "Special Immunity From Accomplice Liability"

1. The government's breathless claims that petitioner's interpretation would grant "impunity" to every participant in armed robberies and drug deals besides the triggermen, U.S.Br. 35, are difficult to square with its earlier assurances to this Court that because "[l]ittle is required to satisfy the element of facilitation" under the majority rule, its application would have "minimal practical significance," Br. Opp. 10-11 (quoting Pet. App. 10a). The government strains to exaggerate the difficulty of proof, mainly through sheer repetition of a purported requirement that the defendant "directly facilitate[]" the firearm's use. Compare U.S.Br. 10, 12, 15, 29, 34, 35, 40, 42,

with Pet.Br. 34. In truth, adopting the majority rule would simply mean that the kind of argument the government is *now* making to salvage Rosemond's conviction—that his conduct after learning of the gun intentionally facilitated its use, see U.S.Br. 50—would instead have to be made *to the jury*. Although the government decided not to charge Rosemond with conspiracy (presumably for want of evidence), gang members who plan to use firearms to commit predicate crimes can be charged with conspiring to violate Section 924(c). *Id.* at 20, 30.

The factual questions the government labels "unanswerable" (U.S.Br. 40) are the kind juries routinely answer and indeed are ones juries have *already confronted* without reported difficulty, see *ibid.* The government identifies no authority for removing issues from jury consideration based on purported difficulty, much less for directing jury findings about the Section 924(c) offense from the defendant's participation in a separate predicate crime. The government's reliance on decisions imposing accomplice liability on defendants who "benefitted from [a] weapon in some way" is curious given its concession that their reasoning is "not grounded in traditional aiding-and-abetting principles." *Id.* at 41. Because that theory bases liability on the *happenstance* of whether the firearm facilitated the defendant's conduct, rather than whether his actions *intentionally facilitated* the firearm's use, it is at best a haphazard basis for imposing severe, consecutive Section 924(c) sentences. It has no place in the law of accessory liability.

2. Rosemond's experience illustrates the dangers of the government's relaxed standard. The government does not even *attempt* to show Rosemond knew about the gun before its discharge, and it cites no evidence that he facilitated *any* offense afterward. U.S.Br. 50. Only Joseph (the apparent shooter) explicitly testified that Rosemond stepped out of the car (on the passenger side, J.A. 123); an impartial bystander with a "good view" (J.A. 146) testified that everyone but the shooter (who came from the *driver's* side) remained seated, J.A. 40, 41-42, 48. The government's theory assumes an improbable decision to switch seats for no apparent purpose just as they were hurrying to depart. U.S.Br. 4-5. Even if Rosemond stepped out, reentering the car is highly ambiguous. The government introduced no testimony regarding conduct or statements among Perez's passengers reflecting an understood purpose to pursue Gonzales rather than flee; Perez testified, "*I* was trying to catch up to the other guys that took the stuff," but never said she informed her passengers of her plans. J.A. 109 (emphasis added). The government maintains there is "[n]othing inequitable" about the Tenth Circuit's rule, U.S.Br. 39; but it permits ten years' imprisonment for conduct as ambiguous as failing to exit a car.

3. Contrary to the government's contention. U.S.Br. 34-35, nothing in the legislative history of Section 924(c) suggests Congress sought to cut corners by eliminating the ordinary prerequisites of accomplice liability. Although the circuits lopsidedly favored the majority rule before enactment of the

1998 amendment. Congress left it in place.[6] Indeed, when Congress amended Section 924(c) that year to cover possession, it added language requiring that possession be "in furtherance of" a crime, to "assure that someone who possesse[d] a gun that ha[d] nothing to do with the crime [did] not fall under 924(c)." 144 Cong. Rec. 26,609 (1998) (statement of Sen. DeWine). Given Congress's care to ensure that Section 924(c) did not apply to individuals who lawfully possessed a gun (even at a crime scene), there is nothing exceptional about applying ordinary procedures to ensure that defendants are culpable in a firearm's use before imposing punishment.

D. The Rule Of Lenity Requires Reversal

The government is not "unambiguously correct" that accessory liability under Section 924(c) requires no showing the defendant intentionally facilitated the distinct offense of using a firearm during and in relation to a drug trafficking crime. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Reversal would appropriately "place[] the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States* v. *Santos*, 553 U.S. 507 (2008).

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[6] See *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998); *Bazemore* v. *United States*, 138 F.3d 947, 949-950 (11th Cir. 1998); *United States* v. *Nelson*, 137 F.3d 1094, 1103-1104 (9th Cir. 1998); *United States* v. *Bancalari*, 110 F.3d 1425 (9th Cir. 1997); *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *United States* v. *Medina*, 32 F.3d 40 (2d Cir. 1994); but see *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997).

The government contends that the rule of lenity requires only notice "of what the criminal laws require." U.S.Br. 32. But "[e]lementary notions of fairness * * * dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996). Moreover, the Rule serves a purpose besides notice: that "because of the seriousness of criminal penalties, * * * legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336 (1971) (internal quotation marks omitted). This Court invoked lenity in *Busic* v. *United States*, 446 U.S. 398 (1980), a Section 924(c) case involving circumstances where notice was not at issue.

E. The Error Was Not Harmless

The government concedes (U.S.Br. 52 n.12) that it did not present its harmless error argument to the Tenth Circuit. That concession alone precludes it: this Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198 (2001).

In any event, the argument is meritless. It rests on the inference that because there was no aiding and abetting instruction for the ammunition counts, those convictions necessarily mean the jury concluded Rosemond physically possessed the firearm. U.S.Br. 52. That argument depends on the government's representation that its "only argument to the jury on those counts was that" Rosemond actually possessed

the firearm. *Ibid.* But the government actually told the jury that its evidence of possession was "what I've already talked to you about," J.A. 159—namely, *both* actual possession and constructive possession as an accomplice, J.A. 157; Cert. Reply 10. The instructions emphasized that "possession" included constructive possession through a confederate. J.A. 187-188, 198, 200, which the verdict form underscored by indicating accomplice liability meant Rosemond had "used" the gun, J.A. 203. Because the ammunition convictions provide no basis to "confidently say" Rosemond's Section 924(c) conviction was untainted by the flawed instructions, *Neder*, 527 U.S. at 15-16, it must be reversed.

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed.

Respectfully submitted.

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OCTOBER 2013

AMICUS CURIAE BRIEF

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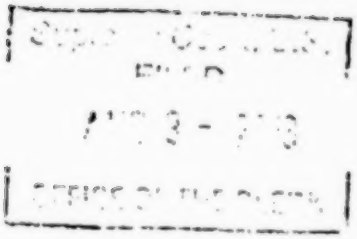

No. 12-895

IN THE

Supreme Court of the United States

JUSTUS CORNELIUS ROSEMOND, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Because the federal government is one of enumerated powers, there is no common law of crimes against the United States. Thus, the federal government has no power to punish criminal conduct, except in accordance with statutes enacted pursuant to the Constitution. Although petitioner has raised no constitutional issue in this case, he is urging this Court to construe the federal aiding and abetting statutory provision according to the plain text of 18 U.S.C. § 2(a), as applied to the firearms offense defined in 18 U.S.C. § 924(c)(1)(A).

As petitioner ably argues, the text of Section 2(a) embraces the common law historic requirement that Rosemond may not be convicted of aiding and abetting an the firearms offense, the violation of which he had been charged, unless he purposely facilitates the commission of that offense. The courts below rejected petitioner's argument, erroneously affirming a jury instruction that permitted a conviction of aiding and abetting a firearms offense solely because Rosemond aided and abetted a drug trafficking offense, knowing that the firearms offense was taking place.

The scope of inquiry in this case, however, should not be limited to the question whether the jury instruction and conviction were warranted in this case. Rather, the question must be examined in light of Alleyne v. United States, decided on June 17, 2013, just 20 days after the Court granted certiorari review of this case. Alleyne overruled Harris v. United

States, construing Section 924(c)(1)(A) to define three firearms offenses instead of only one.

Under Harris, Section 924(c)(1)(A) defined the single offense of the unlawful use, carry or possession of a firearm. Under Section 2(a), a charge of aiding and abetting such use, carry or possession would be sufficient to trigger a sentence of seven years upon evidence that the firearm was brandished, or a sentence of ten years if the firearm was discharged, regardless of whether the aider and abetter purposely facilitated the brandishing or the discharge.

Such will not be the case under Alleyne, which ruled that Section 924(c)(1)(A) defines three separate and distinct offenses — (i) unlawful use, carry, or possession; (ii) brandishing; and (iii) discharge. In order for a defendant to be charged with aiding and abetting a violation of Section 924(c)(1)(A) by "brandishing" or by "discharge" of a firearm, would require evidence that the defendant purposed that the firearm brandished and/or discharged. Even under the Government's aiding and abetting theory, the prosecution would be required to prove that the aider and abetter "knew" the firearm was brandished or discharged, not just unlawfully used, carried or possessed.

These *amici* urge this Court to examine the question raised in this case in light of Alleyne's new interpretation of 924(c)(1)(A) on the further ground that, if the Government's theory of aiding and abetting is affirmed in this case, it will unwisely and unnecessarily expand prosecutorial discretion in the

administration of the mandatory minimum sentence structure of Section 924(c)(1)(A) and undermine the role of the jury envisioned in Alleyne.

ARGUMENT

At the time that Rosemond was charged with, and tried for, aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), that section had been interpreted by this Court to have defined a "single offense," one that could be proved by evidence of the use or carrying a firearm "during and in relation to a crime of violence or drug trafficking crime" or possession of a firearm "in furtherance of any such crime." *See* Harris v. United States, 536 U.S. 545, 550 (2002). While Rosemond also had been charged with "discharging" a firearm, that charge was not based upon a separate offense defined in Section 924(c)(1)(A)(iii) requiring proof of an additional element. Rather, under Harris the "discharge" provision, like the "brandishing" provision of subsection (ii), was ruled to be only a sentencing factor, increasing the mandatory minimum sentence of five years for unlawful use, carry or possession, as provided in subsection (i) to the ten-year minimum set by subsection (iii). *Id.* at 552-54. Such was the state of the law on May 28, 2013, when the petition for certiorari was granted herein.

Twenty days later, on June 17, 2013, this Court overruled Harris, holding that "brandishing ... constitutes an element of a separate ... offense." Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2162 (2013). Under Alleyne, Section 924(c)(1)(A) now contains three distinct offenses, instead of one. In Part

II of this brief, *amici* address the issue presented by the petition in light of this significant change in federal law. In Part I, however, *amici* first elaborate on the issue under the Harris ruling that Section 924(c)(1)(A) defines a single offense of unlawful use, carry or possession, as set forth in Petitioner's merits brief.

I. THE TRIAL COURT'S JURY INSTRUCTION ON WHETHER ROSEMOND AIDED AND ABETTED A VIOLATION OF 18 U.S.C. § 924(C)(1)(A) WAS ERRONEOUS.

A. 18 U.S.C. § 2(a) Governs the Aiding and Abetting of a Federal Crime.

At issue in this case is a question of accomplice liability as provided for in Section 2(a) of Title 18 of the United States Code, and as applied to the firearms offense defined in 18 U.S.C. § 924(a)(1)(A). Because the federal government is one of enumerated powers, "[t]here are no common-law crimes against the United States...." W. Clark, Handbook of Criminal Law, p. 26 (West: 1915). "It can punish no offenses that have not been expressly defined, and made punishable by an act of Congress." *Id.*

This does not mean that the common law is irrelevant in the interpretation and application of a federal criminal statute. Oftentimes, Congress employs the language of the common law to describe a congressionally-enacted offense. *See* Brief for the Petitioner ("Pet. Br.") at 24.

Such is the case with 18 U.S.C. § 2(a), which provides, in pertinent part, that "[w]hoever commits an **offense** against the United States or **aids, abets,** counsels, commands, induces or procures **its** commission, is punishable as a principal." (Emphasis added.) *See* Pet. Br. at 13-14. While these "[s]everal terms have been employed by courts and legislatures in describing the kinds of acts which will suffice for accomplice liability,"[2] historically the foremost are "aiding" and "abetting." *See* Clark's Criminal Law at 113-15. For example, Clark's 1915 handbook states that "[t]o abet a crime is to incite or set another on to commit it, and includes procuring, counseling, and commanding its commission." *Id.* at 119.

It is not enough, however, that a person act in such a way as to facilitate the commission of an offense; he must also "purpose[ly] encourage or assist another in the commission of [the] crime...." LaFave and Scott's Criminal Law at 506. Or, as Clark puts it, "there must ... be a community of unlawful purpose at the time the act is committed; for one is not responsible for the act of another unless he expressly or impliedly authorized the other to do that act."[3] Clark's Criminal Law at

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[2] W. LaFave & A. Scott, Jr, Criminal Law at 502 (West: 1972) ("LaFave & Scott's Criminal Law").

[3] "Aiding" and "abetting" is thus a far cry from "strict liability." Rather, it is based upon the principle of individual fault stated in Deuteronomy 24:16 that "every man shall be put to death for his own sin," and applied by King Amaziah in 2 Chronicles 25:1-4. *See* Clark's Criminal Law at 25 ("Morality and the teachings of Christianity have had an influence on the formation of the common law, as well as on legislators.")

115. Even more transparently, as LaFave and Scott have written:

> Under the usual requirement that the accomplice must intentionally assist or encourage, it is **not** sufficient that he intentionally engaged in acts which, as it turned out, did give assistance or encouragement to the principal. Rather, the accomplice must **intend** that his acts have the effect of assisting or encouraging another. [LaFave & Scott's Criminal Law at 506 (emphasis added).]

To be sure, LaFave and Scott have acknowledged that there is some authority for the proposition that "aid with knowledge" that another is engaged in an unlawful act is sufficient to prove accomplice liability. *Id.* at 508. But they go on to point out that:

> [T]he traditional definition[] of accomplice liability ... "demand[s] that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used — even the most colorless 'abet' — carry an implication of purposive attitude towards it." [*Id.*]

By employing the traditional language of aiding and abetting, Section 2(a) is best understood to require not just that a person "know" that the one whom he is aiding is committing the unlawful act, but that the accomplice's purpose be that the other succeeds in its commission. *See* Pet. Br. at 2-5, 12-14, and 24-26.

B. The Instruction As To Whether Rosemond Was Guilty of Aiding and Abetting the Charged Firearms Offense Was Clearly Erroneous.

Applying these common law principles to the aiding and abetting charge against Rosemond, there is no question that the jury instruction did not comply with the textual command of 18 U.S.C. § 2(a). Rosemond was **charged** with aiding and abetting the **discharge of a firearm**, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. § 924(c)(A)(i) and (iii). He was **not** charged with aiding and abetting the federal **drug trafficking** crime itself. *See* Pet. Br. at 6-7. However, the trial court rejected Rosemond's proposed instruction that he "may be liable for aiding and abetting the use of a firearm during the drug trafficking crime," if (i) he "knew that another person used a firearm in the underlying drug trafficking crime" and (ii) he "intentionally took some action to facilitate or encourage the use of the firearm." *See id.* at 9. Instead, the trial court instructed the jury to find Rosemond guilty if (i) he only "knew his cohort used a firearm in the drug trafficking crime," so long as (ii) he "knowingly and actively participated in the drug trafficking crime." *See id.*

According to the plain text of 18 U.S.C. § 2(a), one must first identify the "offense," the commission of which is the object of the aiding and abetting charge. In Rosemond's case the targeted offense was the firearms crime defined in Section 924(c)(1)(A), not the drug trafficking crime defined by 21 U.S.C. § 841(a)(1). As applied to Section 924(c)(1)(A), then, Section 2(a)

would require more than evidence that Rosemond "knew" that one of his confederates had a firearm in his possession; rather, to prove aiding and abetting a violation of 924(c)(1)(A), Section 2(a) requires evidence that Rosemond purposely encouraged or facilitated the unlawful use of the firearm. Without such proof, there would be no "community of purpose" as to the firearms offense.

II. THE GOVERNMENT'S INTERPRETATION AND APPLICATION OF 18 U.S.C. § 2 TO 18 U.S.C. § 924(c)(1)(A) CONFLICTS BOTH WITH ALLEYNE v. UNITED STATES AND WITH SOUND FEDERAL PROSECUTORIAL POLICY.

Although the question before the Court is not the constitutionality of either 18 U.S.C. § 924(c)(1)(A) or 18 U.S.C. § 2(a), but rather their interrelation and application, it is important to reiterate the foundational principle that "[t]he United States Congress has ... only such power as is expressly or by implication conferred by the Constitution." *See* Clark's Criminal Law at 27-28. Conspicuously absent from those "few and defined" powers[4] vested in the federal government is a general police power, including the power to enact and enforce a generally applicable criminal code — a power reserved by the Tenth

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[4] *The Federalist No. 45*, The Federalist at 241 (G. Carey and J. McClellan, eds., Liberty Fund: 2001) ("The powers delegated by the proposed constitution to the federal government, are few and defined. Those which remain in the state governments, are numerous and indefinite.")

Amendment to the States. *See* The Federalization of Criminal Law 5-6 (ABA Task Force on the Federalization of Criminal Law: 1998) ("ABA Task Force Report").

"[G]enerally premised on an assertion of Congressional power to regulate interstate commerce" (*id.* at 6), Congress's initial foray into the criminal law was limited to prohibiting actual movement across state lines, such as the interstate transportation of lottery tickets. *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903). However, this intrusion was soon expanded to "subjects clearly ... within the ambit of the states' police powers." ABA Task Force Report at 6. By the middle of the Twentieth Century, Congress had dropped all pretense of protecting the criminal pollution of interstate commerce. Instead, using the Commerce Clause only as a hook to establish jurisdiction, Congress justified its encroachment upon the powers reserved to the States on the ground that the States were unable, without federal help, to fight crime. *See, e.g.*, S. Rep. 1097 to accompany S. 917 (Omnibus Crime Control and Safe Streets Act of 1968), reprinted in 2 U.S.C.C.A.N. 2113-14 (90th Cong., 2d Sess. 1968). In particular, Congress decided that the States needed "Federal controls over interstate and foreign commerce in firearms [in order] to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power." *Id.* at 2114.

While the major thrust of federal involvement came in the form of the licensure of persons engaged in the business of importing, manufacturing and dealing in

firearms, the Gun Control Act of 1968 added a slew of federally-enforceable crimes involving firearms, including the forerunner of 18 U.S.C. § 924(c)(1)(A), the current version of which is before this Court in this case. This is not the first time that a question of construction of this Act has come to the attention of this Court. As Duke Law Professor, Sara Sun Beale, has noted, "the volume of litigation concerning the definition of 924(c) has been extraordinary":

> The Supreme Court has decided eight cases involving different facets of construction of 924(c) since its passage in 1968, and many other issues have been litigated extensively in the lower courts. This unusual volume of litigation results, at least in part, from especially aggressive efforts by federal prosecutors to impose harsher penalties in cases at — or beyond —the outer limits of the statute, as defined by the statutory terms enacted by Congress. [S. Beale, "The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors," 51 *Duke L. J.* 1641, 1666-67 (2002) ("Unintended Consequences").]

Indeed, as noted in the introduction to this argument, less than a month after granting certiorari review to assess the legitimacy of the Government's expansive use of the aiding and abetting provision of 18 U.S.C. § 2, as applied to Section 924(c), this Court shortened the reach of prosecutorial discretion under Section 924(c)(1)(A) in Alleyne v. United States.

A. 18 U.S.C. § 924(c)(1)(A) Defines Three Different Crimes, Not Just One.

The original version of Section 924(c) was relatively simple and straight-forward. It imposed a mandatory minimum sentence of one year on any person who "use[d] a firearm to commit" a federal felony, or "carrie[d] a firearm unlawfully during the commission of any" federal felony. That mandatory minimum was increased to five years upon a "second or subsequent conviction." Public Law 90-618, 82 Stat. § 624 at 1224 (Oct. 22, 1968). This original provision, however, was soon amended by Congress, and subjected to a number of court decisions through the years:

> In 1984, the statute was amended to require at least five years imprisonment to be served consecutive to the sentence for the underlying offense, if a defendant "uses" or "carries" a firearm "during and in relation to "any crime of violence." In 1986, drug trafficking offenses were added, and sentences of up to thirty additional years were mandated for more dangerous weapons, such as assault rifles or machine guns. Further amendments in 1988, 1990, and 1994 required sentences of twenty years to life imprisonment without parole for offenders with prior convictions. [P. Hofer, "Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement," 37 AM. CRIM. L. REV. 41, 41-42 (2000).]

Thereafter, following a 1995 decision by this Court narrowing the "'uses' provision in the statute, ... Congress re-expanded the statute's scope to all forms of possession of a firearm 'in furtherance of'" a predicate crime. *Id.* at 42. And, at the same time, Congress passed legislation establishing "a regime of even higher mandatory penalties for 'brandishing' or 'discharging' a weapon, and increased penalties for repeat offenders and those that use certain types of dangerous guns." *Id.*

In 2002, this Court ruled that Section 924(c)(1)(A) defined a single crime, and that "brandishing" a firearm during and in relation to a predicate offense (and presumably so "discharging" a firearm) was a sentencing factor, not an element of a separate offense. *See* Harris, 536 U.S. at 553-54. Under Harris, all the prosecution was required to prove beyond a reasonable doubt was whether a defendant used or carried a firearm during and in relation to any crime of violence of a drug trafficking crime, or possessed a firearm in furtherance of such crime. *See id.* at 552-53. Applying this interpretation of Section 924(c)(1)(A) to a charge of aiding and abetting its violation under 18 U.S.C. § 2, most federal courts determined that, unless the prosecution proved that a defendant had "facilitated or encouraged" the use, carrying or possession of a firearm in the way prohibited by Section 924(c)(1)(A), he could not be convicted of aiding and abetting the commission of the single "offense" defined in that subsection. *See* Pet. Br. at 31-35. Upon conviction, the defendant could be sentenced to five, seven, or ten years, depending upon the whether, by only a preponderance of the evidence, the firearm had just

been unlawfully used, carried, or possessed, or had been brandished or discharged.

On June 17, 2013, however, this Court overruled Harris, determining that subsections (ii) and (iii) of Section 924(c)(1)(A) constitute elements of two separate offenses in addition to the single crime of use, carrying or possession of a firearm. *See* Alleyne, 133 S. Ct. at 2155-56. By a five-to-four vote, the Court found that "brandishing" was an element of the offense described in Section 924(c)(1)(A)(ii) because, by raising the mandatory minimum sentence from five years to seven, it is a "fact [that] increases the punishment above what is otherwise legally prescribed." *Id.* at 2158. Presumably, for the same reason, "discharg[ing] the firearm" is also an element of a separate crime because the fact that a firearm is discharged "during and in relation" to the predicate crime would raise the mandatory minimum sentence from five years to ten, thereby increasing the punishment above what is otherwise legally prescribed. *See id.* at 2160-61.

The question before the Court, then, has become more complicated since granting the Petitioner's writ. Under Harris, Section 924(c)(1)(A) defined only a single offense and, thus, under Petitioner's view, Section 2 required only evidence that a defendant aided and abetted the unlawful use, carry, or possession of a firearm. Under Alleyne, Section 924(c)(1)(A) defines three offenses. While the use, carry, or possession is a lesser included offense to the

brandishing and discharging offenses,[5] under Petitioner's view of Section 2, the prosecution would be required to charge and prove that a defendant facilitated or encouraged the brandishing of a firearm under subsection (ii), or the discharging of a firearm under subsection (iii). Even under the Government's view, this complication could not be avoided, the prosecution having to prove not just knowledge that the principal unlawfully used, carried, or possessed a firearm, but knowledge that the principal brandished or discharged that firearm, unless the prosecution chose to limit the indictment to the single charge of unlawful use, carry, or possession.

B. The Government's View of Prosecutorial Discretion, as Applied to the Enforcement of 18 U.S.C. § 2 and 18 U.S.C. § 924(c)(1)(A), Should Be Rejected.

As Professor Beale has argued in her article on the unintended consequences of enhancing gun penalties,

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[5] "When a greater and lesser offense are charged to the jury, the proper course is to tell the jury to consider first the greater offense, and to move on to consideration of the lesser offense only if they have some reasonable doubt as to guilt of the greater offense. A jury that finds guilt as to the greater offense does not enter a verdict concerning guilt of the lesser offense. The reason for this absence of consideration is not any inconsistency between the offenses. It rather reflects the very 'inclusion that defines the lesser offense as one 'included' in the greater. A lesser included offense is one which is necessarily established by proof of the greater offense and which is properly submitted to the jury, should the prosecution's proof fail to establish guilt of the greater offense charged, without necessity of multiple indictment." Fuller v. United States, 407 F.2d 1199, 1227-28 (D.C. Cir. 1967).

the pressure on Congress to increase such punishments comes primarily from prosecutors. Beale, "Unintended Consequences," 51 DUKE L. J. at 1666. This pressure has especially been felt in the ongoing battle over "the line defining the elements of the offenses defined by 18 U.S.C. §924(c)." *Id.* at 1666. While Congress has been responsible for "ratchet[ing] up the penalties" under 924(c), federal prosecutors have taken advantage of the harsher minimum penalties mandated by law to be served consecutively to all other sentences by "aggressively seeking to broaden its reach through expansive interpretation of its terms." *Id.* at 1675.

This aggressive stance has spilled over to this case. The prosecution is seeking an expansive reading of 18 U.S.C. § 2, thereby easing its burden to bring a defendant within the mandatory minimum sentencing scheme of Section 924(c). As Professor Beale has observed of the general practice of prosecutors, "Section 924(c) ... operates as a kind of super-enhancement statute...." *Id.* at 1670.

Indeed, in a very careful study of the impact of statutes mandating minimum penalties, when placed in the hands of federal prosecutors in the current sentencing guidelines system, St. John's law professor Michael Simons has documented that "there is no question that mandatory sentences shifted enormous sentencing authority to prosecutors." M. Simons, "Prosecutors as Punishment Theorists: Seeking Sentencing Justice," 16 GEO. MASON L. REV. 303, 324 (2009). Professor Simons has observed that because statutory minimum sentences trump the Sentencing

Guidelines, the prosecutor establishes a statutory floor below which the sentencing judge may not go. *See id.* at 327.

With respect to the mandatory minimums set by Section 924(c), Professor Simons has pointed out that Congress has vested the prosecutor with even greater sentencing powers: "the mandatory sentences of five, seven, or ten years (depending on whether the gun was possessed, brandished, or discharged) must be served consecutively, with any sentence imposed for the underlying drug crime or crime of violence...." *Id.* at 330. Such enhancements apply only if the prosecutor includes violation of Section 924(c) as a separate charge which, now under Alleyne, must be proved beyond a reasonable doubt.

If the standard of proof is mere knowledge of unlawful use, carry, or possession of a firearm, or knowledge of its "brandishment" or "discharge" in order to convict a defendant of aiding and abetting another's violation of Section 924(c), as the Government contends, this would exacerbate an already largely established "charge-based system in which prosecutorial decisions determine the sentence." *Id.* at 330. As Professor Simons has demonstrated, such a system of sentencing, portend "a very real danger ... that prosecutorial charging decisions will result in both unwarranted disparity (where similarly situated defendants receive vastly different sentences) and unwarranted uniformity (where defendants with widely varying degrees of culpability receive similar sentences)." *Id.* at 330-31.

Additionally, if the Government's view of the application of 18 U.S.C. § 2 were adopted, it would confer upon prosecutors in every case an even wider berth to employ Section 924(c) as a "bargaining chip," making its mandatory minimum and sentence enhancements "applicable in more cases."[6] *See* Beale, "Unintended Consequences," at 1677. As Professor Beale has observed:

> [O]verbroad mandatory minimum penalties ... create special hazards to accuracy in a plea bargaining regime, insofar as super-enhanced penalty provisions give prosecutors an unchecked opportunity to overcharge and generate easy pleas. This excessive plea leverage reduces the prosecutors' incentive to separate innocent from guilty defendants at the charging stage, increasing the chance that innocent defendants will be convicted. [*Id.* at 1680.]

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[6] Instead of making it easier for a prosecutor the prove aiding and abetting a violation of Section 924(c), courts ought to be very wary of adding yet another prosecutorial advantage because "[t]he machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, it can nail anybody. There is some truth to this, since there are literally thousands of federal criminal laws, many of them at once broad, vague, obscure, and under enforced." *See* R. Posner, An Affair of State, Harvard Univ. Press, p. 87 (1999).

C. The Government's Attempt to Minimize the Difference Between Knowing that a Firearm is Being Used, and Intentionally Facilitating its Use, Is Unpersuasive.

In its brief filed in opposition to granting this petition for review, the Government contended that because so "'[l]ittle is required to satisfy the element of facilitation'" of the use of a firearm in order to sustain a charge of aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), the difference between "facilitation" on the one hand, and "knowledge," on the other "appears to have minimal practical significance at this time." Brief of the United States in Opposition, at 10-11 ("Govt. Opp. Br."). The issue treated dismissively by the Government is certainly significant for Mr. Rosemond who will spend an extra 10 years in prison based on what the Government considers "little."

Although, the difference between "knowledge" of use of a firearm, and "facilitation" of the use of a firearm may seem paper thin in the hands of appellate judges (*see, e.g.*, Govt. Opp. Br. at 11-12), the distinction may loom much larger when the issue is submitted to a jury. Indeed, as this Court emphasized in Alleyne, the distinction between "brandishing" and "discharging" as a sentencing factor, on the one hand, and as an element of the offense, on the other, is that, construed as an element, it "preserves the historic role of the jury as an intermediary between the State and criminal defendants." *Id.*, 133 S.Ct. at 2161.

While prosecutors would rather this Court construe Sections 2(a) and 924(c)(1)(A) more liberally in favor of

their having greater discretion, the nation's constitutional diffusion of power between federal and state governments, and of specified limits on the enforcement of the criminal law, support a narrower reading, reducing the scope and impact of prosecutorial discretion, not enlarging it. *See generally* Beale, "Unintended Consequences."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JUSTUS C. ROSEMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.*

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of federal criminal law. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that the government meet its burden to show that a defendant aided and abetted the crime he or she is charged with aiding and abetting under 18 U.S.C. § 2(a), and not

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

simply that he or she aided and abetted some other crime or predicate offense.

SUMMARY OF ARGUMENT

Seventy-five years ago, Judge Learned Hand examined the text of the federal aiding and abetting statute and the centuries-old common law crime it codified and formulated the classic test that this Court and every federal court of appeals has adopted since: the statute "demand[s] that [the defendant] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Thus stated, the defendant's "guilty act" is his participation in another's crime, and his "guilty mind" is his intent to facilitate that crime. This Court, and every federal court of appeals with criminal jurisdiction, has held that the current aiding and abetting statute, 18 U.S.C. § 2(a), requires this same actus reus and mens rea.

The Tenth Circuit's rule inexplicably casts aside this precedent, and permits a defendant to be convicted of aiding and abetting a violation of 18 U.S.C. § 924(c) without *either* the required actus reus *or* the required mens rea. Under the Tenth Circuit's rule, the government must make two *different* showings: that the defendant participated in and intended to facilitate the predicate crime of violence or drug trafficking, and that he or she acquired knowledge of the full Section 924(c) violation (including the use or carrying of a firearm).

This approach alters the crime of aiding and abetting in a fundamental way. It allows conviction where the evidence demonstrates the defendant's

participation in a predicate crime and not the crime he or she is charged with aiding and abetting, and where the evidence demonstrates the defendant's knowledge of the crime he or she is charged with aiding and abetting and not the defendant's intent to facilitate that crime. Altering the proof required as the Tenth Circuit has done dramatically expands the scope of criminal aiding and abetting liability under the federal statute.

It is plainly not true that in *every case* in which a defendant participated in the predicate crime of violence or drug offense, and gained some knowledge of the full Section 924(c) violation, he or she also participated in and intended to facilitate the full Section 924(c) violation. To the extent that the Tenth Circuit's rule presumes a perfect correlation, it is wrong. To the extent that it simply considers the outlying cases to be insignificant or unimportant, it is unfair.

The well-established rule that the Tenth Circuit has renounced—as Judge Hand explained and as the federal courts have held in applying that rule to endlessly varying fact patterns—requires the government to show participation in and intent to facilitate the crime the defendant is charged with aiding and abetting. By requiring the government to prove aiding and abetting in this way, the rule ensures that defendants who are innocent of the crime charged are not automatically swept up in a standard that is too broad or too vague. This Court should reject the Tenth Circuit's rule and reaffirm that the federal aiding and abetting statute requires proof that the defendant participated in and sought to facilitate the principal's crime.

ARGUMENT

A. The Majority Rule Is Consistent With Basic Principles Of The Law Of Aiding And Abetting

As relevant here, 18 U.S.C. § 924(c) makes it a crime to use or carry a firearm during and in relation to a crime of violence or drug trafficking crime. The majority of courts of appeals have correctly concluded that, to be guilty of aiding and abetting a violation of Section 924(c), a defendant must have intentionally facilitated the entire offense, including the use or carrying of the firearm. That conclusion follows from two basic principles of the law of aiding and abetting. The first is that aiding and abetting has two critical elements: that the accused aider and abettor participated in the principal's crime *and* that he or she intended to facilitate that crime. The second is that, for crimes with a predicate-offense element, like Section 924(c), the accused aider and abettor must have participated in and sought to facilitate the principal's *entire* crime, not merely the predicate-offense element.

1. To prove aiding and abetting, the government must establish that the defendant participated in and sought to facilitate the commission of the principal's crime

In *Peoni*, Judge Hand held that an earlier version of the federal aiding and abetting statute—which, like the present one, punished as a principal anyone who "aids, abets, counsels, commands, induces, or procures" the commission of an offense—required intentional conduct on the part of the accused aider and abettor. 100 F.2d at 402. All of the

words chosen by Congress, Judge Hand explained, demand that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Ibid.* In *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), this Court adopted Judge Hand's test for prosecutions brought under the current aiding and abetting statute, 18 U.S.C. § 2(a).

As this Court has since reaffirmed, aiding and abetting thus requires "intentional wrongdoing." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994). Section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Id.* at 181 (citing *Nye & Nissen*, 336 U.S. at 619).

The federal courts of appeals—including the Tenth Circuit, whose decision is under review in this case—have uniformly employed similar formulations for criminal aiding and abetting liability. See, *e.g.*, *United States* v. *Poston*, 902 F.2d 90, 93 (D.C. Cir. 1990) (Thomas, J.) ("the elements of aiding and abetting" include "the specific intent to facilitate the commission of a crime by another" and "that the accused assisted or participated in the commission of the offense") (internal quotation marks omitted); *United States* v. *Samaria*, 239 F.3d 228, 234-35 (2d Cir. 2001) (Sotomayor, J.) ("[A]iding and abetting is * * * a specific intent crime. * * * [T]he government must prove * * * that the defendant acted * * * with the specific purpose of bringing about the underlying crime.") (internal quotation marks omitted), overruled on other grounds by *United States* v. *Huezo*,

546 F.3d 174 (2d Cir. 2008); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999) ("[L]iability for aiding and abetting * * * requires the specific intent of facilitating the crime, and mere knowledge of the underlying offense is not sufficient for conviction.") (citations omitted); *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997) ("Aiding and abetting is a specific intent crime."); see also *United States* v. *Jackson*, 213 F.3d 1269, 1292 (10th Cir.) ("[A]iding and abetting is a specific intent crime because it requires the defendant to act willfully by participating in the venture and also requires the defendant to have the specific intent to make the venture succeed through his or her acts."), vacated on other grounds, 531 U.S. 1033 (2000).

It is thus a settled principle that, to prove a defendant guilty of aiding and abetting someone else in the commission of a particular crime, the government must establish that the defendant committed the required actus reus—that is, that he or she participated in that crime—and that the defendant did so with the required mens rea—that is, that he or she had the specific purpose of bringing about that crime. To meet this burden of proof, the government must establish both of these requirements with respect to the particular crime the defendant is charged with aiding and abetting.

2. To prove aiding and abetting of a crime with a predicate-offense element, the government must establish that the defendant participated in and sought to facilitate the entire crime, not merely the predicate-offense element

The actus reus and mens rea requirements of the federal aiding and abetting statute apply in just this way, and the government's burden does not change, when the charged crime incorporates a predicate offense or is an aggravated offense that includes a lesser offense. To convict a defendant of aiding and abetting such a crime, the government must prove that the defendant participated in and intended to facilitate the *entire* crime. Proof that the defendant participated in and intended to facilitate the predicate or lesser offense alone is insufficient.

To ensure that the government meets its burden of proof for a crime of this kind, courts require a showing that the defendant participated in and intended to facilitate the aggravated or separate offense component of the crime. It has thus been held that, "[w]here a defendant is charged with aiding and abetting a crime involving an element which enhances or aggravates the offense, there must be proof that the defendant associated herself with and participated in both elements of the crime." *United States* v. *Garcia*, 567 F.3d 721, 732 (5th Cir. 2009) (internal quotation marks omitted). This rule has been applied to various crimes. See, *e.g.*, *United States* v. *Dinkane*, 17 F.3d 1192, 1197 (9th Cir. 1994) ("[T]o convict a getaway driver of aiding and abetting an armed bank robbery, the government must first show that the defendant knowingly and intentionally

aided and abetted the underlying offense of unarmed bank robbery and then show that the defendant knowingly and intentionally aided the commission of the aggravating element: assaulting a person or putting a life in jeopardy before or during the commission of that aggravating element."); *United States* v. *Capers*, 708 F.3d 1286, 1306-1307 (11th Cir.) ("[O]ur precedent provides that in a prosecution for aiding and abetting possession of [narcotics] with intent to distribute, there must be evidence connecting the defendant with both aspects of the crime, possession and intent to distribute.") (internal quotation marks omitted), petition for cert. filed, No. 12-10635 (June 3, 2013).

These proof requirements ensure that the government meets its burden under 18 U.S.C. § 2(a) to show that the defendant aided and abetted the complete offense and not just the predicate- or lesser-offense element. Not every defendant who participates in and intends to facilitate the predicate or lesser included offense is also guilty of participating in and intending to facilitate the greater offense.

This rule makes good sense. If it were otherwise, a defendant who merely *assisted* in the commission of a *lesser* offense would be treated the same as a defendant who actually *carried out* the *greater* offense. There is no possible justification for such a counter-intuitive and profoundly unfair result.

3. As applied to aiding and abetting a violation of 18 U.S.C. § 924(c), these principles require the government to establish that the defendant participated in and sought to facilitate the use or carrying of the firearm during and in relation to the predicate offense

These principles have a straightforward application to 18 U.S.C. § 924(c). As relevant here, the offense defined by that provision has two elements: (1) the commission of the predicate crime of violence or drug trafficking, and (2) the use or carrying of a firearm during and in relation to that crime. See 2 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions: Criminal*, Instruction 35-87 (2013). As the majority of courts of appeals have held, to convict a defendant of aiding and abetting a Section 924(c) violation, the government must therefore show that the defendant *both* participated in *and* intended to facilitate the use or carrying of the firearm during and in relation to the predicate crime, not merely that he or she participated in and sought to facilitate the predicate offense. See *United States* v. *Medina-Roman*, 376 F.3d 1, 6 (1st Cir. 2004); *United States* v. *Medina*, 32 F.3d 40, 45 (2d Cir. 1994); *Garth*, 188 F.3d at 113; *United States* v. *Sorrells*, 145 F.3d 744, 754 (5th Cir. 1998); *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam); *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758-759 (8th Cir. 2007); *Bancalari*, 110 F.3d at 1429-1430; *United States* v. *Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990).

Judge O'Scannlain has explained the connection between that holding and the broader principles of the law of aiding and abetting discussed above. As

he put it, to convict a defendant of aiding and abetting an aggravated crime or a crime that incorporates a separately punishable predicate offense, the government must offer "discrete proof of the accomplice's intentional abetment" of the "essential element" that "aggravates the crime from a less serious to a more serious offense" or that "by itself imposes an additional criminal offense." *United States* v. *Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002). Judge O'Scannlain went on to point out that, in the absence of such proof, courts not only have "reduc[ed] an aiding and abetting conviction from *armed* bank robbery to *unarmed* bank robbery," but have "revers[ed] a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), which creates an additional offense for using a firearm in the course of a federal crime." *Ibid.* (citing *Dinkane*, 17 F.3d at 1196-1197, and *Bancalari*, 110 F.3d at 1429-30). The latter result necessarily follows from the broader principles he described.

As the majority of courts of appeals have recognized, these principles mandate a showing that the defendant participated in and intended to facilitate the entire Section 924(c) offense, which includes the use or carrying of a firearm. The government must prove as the actus reus and mens rea the defendant's participation in and intent to facilitate the firearm element. A showing that the defendant participated in and intended to facilitate the predicate-offense element is not enough. Nor is a showing that the defendant participated in and intended to facilitate the predicate crime with mere *knowledge* of the firearm element.

B. The Tenth Circuit's Rule Eliminates Both The Actus Reus And The Mens Rea Requirements For Aiding And Abetting

In contrast with the majority rule, the rule in the Tenth Circuit, applied below, is that a defendant can be convicted of aiding and abetting a violation of 18 U.S.C. § 924(c) if he or she (1) "knowingly and actively participated in the drug trafficking crime" and (2) "knew his [or her] cohort used a firearm in the drug trafficking crime." Pet. App. 7a. This rule is wrong for two independent reasons: it eliminates the required *actus reus* for aiding and abetting—that the defendant *participated in* the entire offense, including the use or carrying of a firearm; and it eliminates the required *mens rea* for aiding and abetting—that the defendant *intended to facilitate* the entire offense, including the use or carrying of a firearm.

1. The Tenth Circuit's rule eliminates the required actus reus

The Tenth Circuit's rule eliminates the requirement that, to convict a defendant of aiding and abetting a particular crime, the government must demonstrate that he or she participated in that crime, and not merely in some predicate or lesser offense that is a component or element of the crime. Instead, the Tenth Circuit permits the government to demonstrate aiding and abetting by establishing participation in the predicate offense.

At the petition stage, the government argued that the Tenth Circuit's rule did not eliminate the actus reus requirement because, "[t]o be convicted of aiding and abetting, participation in every stage of an illegal venture is not required," and "[w]hen a person actively participates in the underlying crime

of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense." Br. in Opp. 8 (internal quotation marks omitted). This defense of the Tenth Circuit's rule is groundless. While it may be true that the government need not prove that an accused aider and abettor participated in "every stage" of an "illegal venture," it still must establish that he or she participated in some way in the "illegal venture" of the principal. In a case in which the defendant is charged with aiding and abetting a violation of Section 924(c), the "illegal venture"—*i.e.*, the principal's *crime*—is not "the underlying crime of violence or drug trafficking offense," which can be and ordinarily is prosecuted separately, but rather the use or carrying of a firearm during and in relation to the underlying crime. A defendant who does not participate at all in the use or carrying of a firearm has not participated in *any* stage of this crime.

Indeed, if it were really the case that a defendant could be convicted of aiding and abetting a Section 924(c) violation as long as he or she aided and abetted the underlying offense (on the theory that the underlying offense is a "stage" of the crime), there would be no obvious reason to require *anything*—whether actus reus or mens rea—with respect to the use or carrying of a firearm. Yet even the government agrees that it is not enough to participate intentionally in the underlying offense; the accused aider and abettor, according to the government, must also have knowledge that the principal used or carried a firearm. See Br. in Opp. 7-10. As we next explain, that limitation is not much of a limitation at all. But whether it is or is not, it is a tacit concession that aiding and abetting a Section 924(c) offense re-

quires more than merely aiding and abetting the underlying crime of violence or drug trafficking crime.

2. The Tenth Circuit's rule eliminates the required mens rea

The Tenth Circuit's rule also eliminates the requirement that, to convict a defendant of aiding and abetting a particular crime, the government must show that the defendant intended to facilitate that crime. Instead, the Tenth Circuit reduces the required mental state, at least as to the firearm, to simple knowledge.

That aspect of the Tenth Circuit's rule is wrong, not only because it is inconsistent with longstanding principles of aiding and abetting, but also because it has absurd consequences. Under a simple knowledge requirement, a defendant may be convicted of aiding and abetting a Section 924(c) violation even if the defendant learned of the gun's existence after his or her own role in the crime ended, even if the defendant responded to the principal's possession of the gun by opposing and attempting to thwart its use, and even if the gun was "used" against the accused aider and abettor during the commission of the crime.

At the petition stage, the government asserted that a defendant cannot be convicted under the Tenth Circuit's rule "unless he had knowledge of the firearm before the underlying crime was *completed*." Br. in Opp. 10. But this limitation offers no protection to defendants whose *role* in the crime was completed when they learned of the gun's existence. For example, if a defendant drove his friend to what his friend promised would be a gun-free drug transaction, and the defendant saw his friend draw a gun to

be used in the transaction as he drove away, the defendant could be convicted of aiding and abetting a Section 924(c) violation in the Tenth Circuit despite having had no advance knowledge of the gun and having not assented to its use by continuing to participate in the crime.

Likewise, if upon discovering the gun, the defendant actively opposed and tried to prevent its use, he still could be convicted of aiding and abetting a Section 924(c) violation in the Tenth Circuit. For example, even if the defendant in the scenario described above had driven back to the drug transaction and persuaded his friend to throw away the gun, he could be liable for aiding and abetting its use. The same would be true if a defendant's cohort pulled out a gun during a drug transaction after agreeing with the defendant that they would "leave his gun at home," cf. Br. in Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)), and the defendant tackled him, seized the gun, and threw it into a river.

Finally, the Tenth Circuit's rule would permit the imposition of aiding and abetting liability when the firearm was used against the defendant himself. For example, if the defendant's cohort pulled out a gun during the drug transaction with the sole purpose of forcing *the defendant* to perform some act related to the transaction, the defendant could be convicted of aiding and abetting a violation of Section 924(c) in the Tenth Circuit.

These scenarios illustrate just how different mere knowledge of criminal conduct is from an intent to facilitate the conduct—and why it is settled law that the latter is necessary to prove aiding and abetting while the former is insufficient. The scenarios

accordingly demonstrate how little sense it makes to say that the defendant in any of them could have aided and abetted the use or carrying of a firearm during and in relation to a crime of violence or drug trafficking crime. Yet that is the result under the Tenth Circuit's rule.

The requirement of intent or purpose to bring about the crime ensures that criminal aiding and abetting liability does not become strict liability or liability based upon mere foreseeability. In *Peoni*, Judge Hand rejected the government's argument that a foreseeability standard should be read into the aiding and abetting statute, finding that its text and history "have nothing whatever to do with the *probability* that the forbidden result would follow upon the accessory's conduct." *Peoni*, 100 F.2d at 402 (emphasis added). The Tenth Circuit's rule elides these critical distinctions and should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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